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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF CHANCERY  
OF THE  
STATE OF NEW YORK.

BY  
OLIVER L. BARBOUR,  
COUNSELLOR AT LAW.

*SECOND EDITION,*  
ANNOTATED, BY  
STEWART RAPALJE.

VOL. I.

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CHANCELLOR, VICE CHANCELLORS,  
AND  
ASSISTANT VICE CHANCELLORS,

DURING THE TIME OF THE FOLLOWING REPORTS.

---

Chancellor.  
REUBEN H. WALWORTH.

Vice Chancellors and Assistant Vice Chancellors.

FIRST CIRCUIT,  
WILLIAM T. McCOUN,  
LEWIS H. SANDFORD,\*  
ANTH'Y L. ROBERTSON, A. V. C.†

SECOND CIRCUIT,  
CHARLES H. RUGGLES,  
SEWARD BARCULO‡

THIRD CIRCUIT,  
AMASA J. PARKER.

FOURTH CIRCUIT,  
JOHN WILLARD.

FIFTH CIRCUIT  
PHILO GRIDLEY.

SIXTH CIRCUIT,  
HIRAM GRAY.§

SEVENTH CIRCUIT,  
BOWEN WHITING.

EIGHTH CIRCUIT.  
FREDERICK WHITTLESEY.

\* Assistant V. C.; and appointed Vice Chancellor, in the place of the Hon. W. T. McCoun, in the spring of 1846. His appointment took effect in Sept. 1846 when his predecessor arrived at the age of 60 years.

† Appointed in the place of the Hon. L. H. SANDFORD, promoted.

‡ Appointed April 4, 1846, in the place of the Hon. CHARLES H. RUGGLES, resigned.

§ Appointed January 13, 1846, in the place of the Hon. ROBERT MONELL, resigned.



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## CASES IN CHANCERY.

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### STRONG vs. WILKIN and others.

[Criticism, 12 N. Y. 415, 423.]

The general personal estate of a female infant is bound by a settlement made upon her marriage, where the property is of such a character that the husband would become entitled to it immediately, upon the marriage, were it not for such settlement. And in cases where the husband takes the legal title to his wife's personal estate, by virtue of the marriage, charged with her equity, such a settlement made by him, even after the marriage, with power to her to dispose of the property by will, would at law be binding upon him in the event of his surviving her.

It would also be binding upon the wife's equitable interest in the property; the husband being entitled to the immediate possession and absolute control of such property, upon making a reasonable provision for the wife and her children.

The article of the revised statutes relative to wills of personal property and the probate of them, which provides that every male person of the age of eighteen years and upwards, and every female *not being a married woman*, of sixteen years or upwards, of sound mind, &c. *and no others*, may execute a will of his or her real or personal estate, does not prevent the execution by a feme covert of a power of appointment of personal estate, by will, where the legal title of such estate is in trustees with power to her to appoint the same by an instrument in the nature of a will.

A will of personal property, made by an infant feme covert, previous to the revised statutes, is a good execution of a power of appointment under a marriage settlement authorizing her, at her decease, to dispose of the capital of the fund in such manner as she might by will direct; although her death did not take place until after the revised statutes went into operation.

Under the article of the revised statutes relative to powers, a married woman may execute a power, either by grant or by devise, according to the authority given by such power.

The testamentary instrument which a married woman executes under a power of appointment, either as to her real or personal estate, is not strictly a will; nor does it operate as such in the proper legal sense of the term. It operates as an appointment; and the devisee or legatee takes the property by the force of the power.

THIS case came before the chancellor upon bill and answer, and upon a master's report of the facts in relation to the rights

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Strong v. Wilkin.

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of such of the defendants as were infants. The object of the suit was to establish a will of the complainant's deceased wife, as a valid disposition of her separate estate held in trust; such will having been lost by accident, or fraudulently and feloniously taken and destroyed. The complainant was married to his late wife in June, 1828; she being then eighteen years of age, and entitled to a large personal estate. By an antenuptial agreement made by her and the complainant, and in contemplation of their intended marriage, it was agreed between them that her property should be conveyed to trustees for her separate use; such trustees to pay her the interest or income during her life, and upon her decease during the lifetime of the complainant, to apply the capital of the fund in such manner as she should by will direct; and that if she should die during her coverture with him, without disposing of such property by will, the same should go to her children in equal proportions; and in case she should leave no child or children, then that the same should go to the complainant. A deed of trust, containing the said agreement, was thereupon made and executed by them, and by Wilkin, Graham and Booraem, as trustees, by which the property was conveyed to such trustees and to the survivor of them, upon the before mentioned trusts. Booraem, one of the trustees, having died after the marriage, and after Mrs. Strong had arrived at full age, she and her husband, together with the surviving trustees, executed another deed or instrument whereby M. Van Gieson was appointed a co-trustee with Wilkin and Graham; and the property was to be held by those three trustees, and the survivors of them, upon the trusts contained in the antenuptial agreement; which agreement was thereby confirmed.

The will in question was made by Mrs. Strong in January or February, 1829, in the presence of three witnesses, and was delivered to Graham, one of the trustees, for safe keeping; and he deposited it in a trunk with other valuable papers, which trunk with its contents was stolen from his office some time in 1836, and was never afterwards discovered. By that will she gave and bequeathed to her husband, the complainant, in case

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ne survived her, the interest, income or avails of all her property during his life, free from the power or control of his creditors. And she directed that the property, after his death, should be divided equally among her children, and in case no such children should survive her husband, then she directed that the property should go to her brothers and sisters, then living, share and share alike. Mrs. Strong died in 1843 without having revoked or altered her will; leaving her husband and seven children surviving her.

*S. A. Foote*, for the complainant.

*B. Whiting*, for the infant defendants.

THE CHANCELLOR. The infant defendants are deeply interested in establishing the validity of the antenuptial settlement in this case. For, the whole property of their deceased mother being personal estate, it would belong to the complainant, by virtue of his marital rights and under the statute of distributions, if the antenuptial agreement and deed of trust should be held to be invalid, upon the ground that she was under age at the time of its execution by her. In this case the husband was an adult and was clearly bound by the settlement, so far as he gave up his right to property to which he would have been absolutely entitled by virtue of his marital rights if the settlement had not been made. And his intended wife relinquished no right by the settlement; but on the contrary she secured to herself the whole income of the property during her coverture, and the right to dispose of it as she pleased at her death. She also secured the property to the children of the marriage, in case she should die without appointing it by will. Nor did she relinquish any right in the property which she would have been entitled to by survivorship in case she had outlived her husband. For, by the terms of the settlement, the whole property was in that event to belong to her absolutely. This case, therefore, steers clear of the question whether an infant, by an antenuptial contract, can bind her interest in real estate, or her equitable interest in personal prop-

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erty which would not belong to her husband by virtue of the marriage alone. In the case of *Simpson v. Jones*, (2 *Russ. & Myl. Rep.* 376,) Sir John Leach says, "the general personal estate of a female infant is bound by a settlement made on her marriage, because such personal estate becomes, by the marriage, the absolute property of the husband, and the settlement is in effect his settlement and not hers." That is undoubtedly the case where the property of the infant is of such a character that the husband would be entitled to it absolutely, immediately upon the marriage. And in cases where he takes the legal title to his wife's personal estate, by virtue of the marriage, charged with her equity, such a settlement made by him, after the marriage, would be binding at law in the event which has occurred. And certainly it would be binding upon her equitable interest in the property. For, all that the wife is entitled to by what is called the wife's equity, is a reasonable provision for herself and her children; and the husband in such a case is entitled to the immediate possession and absolute control of the property, upon making such a provision.

The execution of her will in 1829, and the substance of the same, is proved by two witnesses, as required by the statute on this subject. (2 *R. S.* 68, § 67.) And the evidence is also sufficient to establish the fact that the will in question was fraudulently destroyed in the lifetime of the testatrix. The only remaining question, therefore, is, whether a will of personal property, made by an infant feme covert in 1829, was a good execution of the power of appointment under this marriage settlement, she having lived several years after the revised statutes went into operation.

By the common law an infant was capable of making a will of personal estate. And a feme covert was also authorized to make a will of her separate estate, by the consent of her husband. The precise age at which an infant was allowed to bequeath personal property was not so clearly settled as to be free from doubt; though Blackstone appears to have been of the opinion that females at the age of twelve, and males at the age of fourteen, were competent. (2 *Bl. Com.* 499; *Harg. note to Co.*

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*Lit.* 89, b.) But all writers on the subject admit that at the age of eighteen an infant is competent to dispose of his personal estate by will. And in *Hearle v. Greenbank*, (3 *Atk. Rep.* 709,) where an infant feme covert was of the age of seventeen, Lord Hardwick decided that she was competent to make a valid will disposing of her separate personal estate in the hands of trustees. Here the testatrix was nearly nineteen years of age at the time of making the will in question; and if she had died before the revised statutes went into operation, there could be no possible doubt as to its validity.

The article of the revised statutes relative to wills of personal property and the probate of them, provides that every male person of the age of eighteen and upwards, and every female *not being a married woman*, of sixteen years or upwards, of sound mind and memory, *and no others*, may give and bequeath his or her personal estate by will in writing. (2 *R. S.* 60, § 21.) If this section of the revised statutes applies to the case of the execution of a power of appointment of personal estate by will, where the legal title of such estate is in trustees, with power to a married woman to appoint the same by an instrument in the nature of a will, it will absolutely prevent any such appointment by a feme covert, at any age, hereafter. I cannot however think that the section referred to was intended by the legislature to apply to such a case. For the article of the revised statutes in relation to powers, expressly authorizes a married woman to execute a power, either by grant or by devise, as may be authorized by such power. And she is also authorized to take a general and beneficial power to dispose of lands during her marriage. (*See* 1 *R. S.* 732, § 80; *Idem*, 735, § 116.) It is wholly impossible, therefore, to suppose that the legislature could have intended to give to a feme covert this right to dispose of real estate by devise, in which she had a beneficial interest under a power, and to deprive her of the right to make a similar disposition of her personal property by will; where such property was held by trustees for her separate use, with power to appoint the same by will at her death. The testamentary instrument which the wife executes, under a power of appointment, either as to her

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real or personal estate, is not strictly a will, nor does it operate as such in the proper legal sense of the term. But it operates as an appointment; and the devisee or legatee takes the property by the force of the power. The wife, therefore, by the common law, was authorized to execute a power as to real estate by an instrument in the nature of a will, although *femes covert* were expressly excepted out of the statute of Henry the 8th, authorizing devises of real estate. Whatever may be the construction of these provisions of the revised statutes on this subject, however, in relation to wills executed after December, 1829, those provisions do not apply to the case under consideration. For the seventieth section of the title of the revised statutes in relation to wills and testaments of real and personal property, declares that the provisions of that title shall not be construed to impair the validity of the execution of any will made before the chapter in which that title is contained shall take effect; nor shall it affect the construction of any such will. (2 R. S. 68.) This provision covers the case of wills executed before the first of January, 1830, although the testator died afterwards, as well as those which had taken effect previous to that time.

There must, therefore, be a decree in this case, establishing the will of Mrs. Strong, according to the terms and conditions thereof, as stated in the complainant's bill. The decree must also declare that such will was a valid execution of the power of appointment under the provisions of the antenuptial contract and deed of settlement; and it must confirm the appointment of Van Gieson, as one of the trustees, in the place of the deceased trustee. There does not appear to be any necessity for taking out letters testamentary to enable the trustees to execute their trust in conformity to the directions of the will. By the terms of the trust the trustees, in case of the death of Mrs. Strong before her husband, were to appropriate, apply, and dispose of the trust funds, in such manner as she should by her will order and direct. And although there was an executor named in the will, there does not appear to be any direction to pay over the fund to him as a trustee, or that he has any duty to perform as executor. But the parties seem to have contemplated a continuance of the trust



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*Brindernagle v. German Ref. Church.*

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fund in the hands of the trustees, after the death of Mrs. Strong, in the event which has occurred. For the deed of 1842 provides for the appointment of a new trustee or trustees, from time to time, during the life of her husband as survivor. The legal effect of the will, therefore, was to direct the trustees to pay the interest, or income, of the trust fund to the complainant for life, and to distribute the principal thereof among the children, at his death, if they should survive him. The decree then must direct the trustees, or the survivors of them, and the new trustees who may be appointed in their places from time to time, to keep the trust fund, as it existed at the death of the testatrix, invested in good securities during the life of the complainant, and to pay over to him the interest or income which has arisen since that time, or which hereafter may arise, after deducting the necessary costs, charges, and expenses of executing the trust; and to pay over and distribute the capital of the fund at his death to the persons, and in the manner, directed by the will, as set forth in the bill in this cause.

The costs of the guardian ad litem of the infant defendants, and the costs of the trustees, as well as of the complainant, should be paid out of the income of the fund, if any, which had accrued before the death of the testatrix, and which had not then been paid over to her. And if that is not sufficient, the residue should be paid out of the income which has subsequently accrued.

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**BRINDERNAGLE vs. THE GERMAN REFORMED CHURCH.**

A mortgage was executed in the name of a corporation, and under its corporate seal, by persons claiming to be the trustees thereof; and a bond collateral to such mortgage was at the same time executed by such persons. Subsequently a suit was commenced against the persons executing the mortgage, by certain other persons who claimed to be the rightful trustees of the corporation, to enforce their rights as such trustees. Pending that suit the mortgagee filed a bill to foreclose his mortgage, against the corporation by its corporate name, and against the obligors in the bond. And he obtained the usual decree of foreclosure, and a decree over against the obligors in the bond for the deficiency, if any. The per-

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Brindernagle v. German Ref. Church.

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sons who brought the suit first mentioned were afterwards, by a decree in that suit, declared to be the rightful trustees of the corporation, and the persons who executed the mortgage as trustees were decided to have usurped the powers of the corporation. Those who were declared to be the lawful trustees not having been made parties to the bill of foreclosure, nor served with the process of subpœna against the corporation; *Held*, that the decree in the foreclosure suit was irregular as against the rightful trustees of the corporation, and was not binding upon such corporation. The decree, and all proceedings subsequent to the filing of the bill of foreclosure, were therefore set aside, and the bill was dismissed; but without prejudice to the right of the complainant to proceed in a new suit, at law or in equity, to recover the debt alleged to be due upon his bond and mortgage.

THIS case came before the chancellor upon appeal by C. Schwab, one of the defendants, from an order of the vice chancellor of the first circuit. The bill was filed in this cause to foreclose a mortgage, executed in the name of the corporation of the German Reformed Church in the city of New-York, and under its corporate seal, by the appellant and others, claiming to be the trustees of such corporation; and a bond was at the same time executed by Schwab and his associates, conditioned to pay the moneys intended to be secured by the mortgage. Shortly after the giving of this bond and mortgage the suit of *Gable and others v. Miller and others*, as reported in 10 *Paige's Rep.* 627, was commenced, against Schwab and his associates, to enforce the claim of the complainants in that suit to be the rightful trustees of the church and corporation. Pending that suit, the complainant in this case filed a bill, to foreclose his mortgage, against the corporation by its corporate name, and against the appellant and others as the obligors in the bond. And he obtained the usual decree of foreclosure by default, and a decree over against Schwab and the other persons who were liable upon the bond, for the deficiency, if any, upon the sale of the mortgaged premises under the decree. But as the suit was commenced against the corporation by serving the subpœna upon those who were decreed, in the suit of *Gable v. Miller and others*, to have usurped the powers of the corporation, and those who were declared to be the rightful trustees of the corporation were not made parties to the suit, or served with the process of subpœna, against the corporation, in this foreclosure

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Brindernagle v. German Ref. Church.

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suit, the complainant considered it unsafe and useless to proceed to a sale of the mortgaged premises under his decree. He therefore applied to the appellant and his associates to pay the bond and mortgage, and offered to assign to them the bond and mortgage and decree, upon being paid the amount thereof. This application being declined, he presented his petition to the vice chancellor to be permitted to sue the appellant and his associates, at law, upon their bond, or for such other relief as he might be entitled to under the circumstances of the case. The vice chancellor made an order allowing the complainant to commence and prosecute a suit at law upon the bond, for the recovery of his debt, notwithstanding the commencement of this suit and the decree therein. From this order the defendant C. Schwab appealed.

*D. M. Cowdrey*, for the appellant.

*T. Hastings*, for the respondent.

THE CHANCELLOR. The respondent was undoubtedly entitled to relief in this case, as he could not safely bid upon the property under a decree which was irregular as to the rightful officers of the corporation, in case the decision of the chancellor in the case of *Gable v. Miller and others* should be eventually sustained, upon the appeal which it is understood has been taken to the court of dernier resort. Whether a bona fide purchaser who had no notice of such irregularity would not be protected under a decree which was apparently rightfully obtained against the corporation, by its corporate name, it is not necessary now to decide. But the complainant himself was not bound to take the responsibility of bidding upon the property, under a decree which was irregular; and which would be set aside in case an application for that purpose should be made by the rightful officers of the corporation within a reasonable time. He could not, however, be allowed to retain the decree as rightfully obtained and at the same time so far repudiate it as to sue the defendants at law upon the bond. For, such a proceeding was inconsistent

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La Grange v. L'Amoureux.

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with the decree; which only declared them contingently liable for the deficiency, if any there should be, upon a sale of the mortgaged premises under that decree. The proper relief to be granted, under the circumstances of the case, was to set aside the irregular decree, and to dismiss the complainant's bill; without prejudice to his right to sue at law upon the bond, or to file a new bill to foreclose his mortgage, if he should be advised to do so, after the final decision of the court of dernier resort in the case before referred to.

The order appealed from must therefore be so far reversed and modified as to set aside the decree in this suit, and all proceedings subsequent to the filing of the complainant's bill, and to direct the bill itself to be dismissed, without costs and without prejudice to the complainant's rights to proceed hereafter at law or in equity as he may be advised, to recover the debt due upon his bond and mortgage. And neither party is to have costs as against the other upon this appeal, or upon the application to the vice chancellor.

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LA GRANGE and wife vs. L'AMOUREUX.

Under the 47th section of the article of the revised statutes relative to uses and ~~uses~~ every person who, by virtue of any grant, assignment or devise, is entitled to the actual possession of lands, and the receipt of the rents and profits thereof, has a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest.

The revised statutes have abolished all mere naked trusts of real estate, and only allow trusts to be created for certain specified purposes.

Where it is apparent from a deed that the property embraced in it was intended to be conveyed to the grantee merely as a trustee for others, and not for his own benefit, he will take no legal title or beneficial interest under such deed. And the persons having the legal estate under such deed are not entitled to a decree directing such grantee to convey the property to them.

THE bill in this case stated that J. Holmes, of Albany, died in 1832, leaving his daughter, one of the complainants, and

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eight other children surviving him, who were entitled to the real estate of which he died seized; that at the time of his death he owned in fee certain lots in the city of Albany, described in the bill, which were then subject to a mortgage to the commissioners of loans of the county of Albany; that the mortgage was subsequently foreclosed and the premises were bid in by and conveyed to Jesse Buel, who afterwards conveyed two of those lots nominally to the defendant L'Amoureux, but by a deed which purported to convey them to him "for the benefit of those who were interested in the premises previous to the sale of the same by the commissioners of loans, by virtue of their mortgage." The defendant put in an answer admitting the facts stated in the bill, but insisting that by virtue of the deed from Buel, he, the defendant, obtained an absolute and unconditional estate in the premises, and that they were not held in trust for any other person or persons. He also admitted that he had been requested to convey to the wife of the complainant, C. J. La Grange, one ninth of the premises, but that he had refused to do so, claiming to be himself the absolute owner of the premises by virtue of the deed from Buel. The cause was submitted upon bill and answer.

*A. S. Hills*, for the complainant.

*J. L'Amoureux*, defendant, in person.

THE CHANCELLOR. No one can read the deed in this case, in connection with the facts stated in the bill, without coming to the conclusion that it was the intention of Mr. Buel, the grantor, to convey the premises to L'Amoureux as the mere naked trustee for the heirs at law of J. Holmes, who were equitably entitled to them while in the hands of Buel. And if the deed had been executed, and this bill filed, previous to the revised statutes, it would have been a matter of course to decree a conveyance to the cestui que trusts, according to their respective equitable interests in the premises. The claim of the defendant to hold the premises for his own benefit, under this

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conveyance, which was never intended to give the property to him for his own use, is therefore unconscientious. The complainant, however, is wrong in supposing that the title of the property is vested in L'Amoureux by virtue of this deed. The revised statutes have abolished all mere naked trusts of real estate, and only allow trusts to be created for certain specified purposes. The 47th section of the article of the revised statutes relative to uses and trusts, declared that every person who, by virtue of any grant, assignment, or devise, then was or thereafter should be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, should be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest. (1 R. S. 727.) This is clearly a case of that kind, upon the supposition that the language of this deed is sufficient to identify or ascertain the persons who were intended to take the beneficial interest in the premises under this conveyance; which I think it is. For the persons intended appear to be rendered certain by the facts stated in the bill; facts which show that those who were interested in the premises previous to the sale thereof by the commissioners of loans were the nine children and heirs of J. Holmes, deceased. (See 4 Bac. Abr. Grant, C.)

But even if the persons intended to be beneficially interested in the deed are not so described as to transfer the legal title to them, under the forty-seventh section of the article of the revised statutes before referred to, still this defendant could take no beneficial or legal interest in the premises under that deed. For it is apparent from the deed itself that the property was intended to be conveyed to him as a trustee for others, and not for his own benefit. And by the forty-ninth section of the same article no estate whatever vests in the nominal grantee in such a case.

As the legal title to the lots in question is not in the defendant, the complainants are not entitled to a decree directing him to convey one undivided ninth thereof to them. The proper course therefore is to dismiss their bill, without costs, and without prejudice to their right, in any future litigation in relation to the premises in question, either at law or in equity.

## COITHE, receiver, &amp;c. vs. CRANE.

An appeal bond may be good for the purpose of sustaining the appeal, although it is wholly insufficient to stay the proceedings upon the decree or order appealed from.

To render an appeal valid, it is sufficient if the appeal bond is in a penalty of not less than \$250, with two sufficient sureties who have justified in at least double that sum, and conditioned to prosecute the appeal, and to pay such costs and damages as may be awarded against the appellant.

Where the affidavits of justification, by the sureties in an appeal bond, are endorsed upon, and filed with, the bond and the certificate of approval by the proper officer, and show that each of the sureties is worth the requisite sum, and has all the other qualifications to become such surety, it is not necessary that the certificate of approval should itself state all those facts.

Where the respondent considers the appeal bond as not sufficient to stay his proceedings upon the order or decree appealed from, he may proceed as though there was no appeal, leaving the appellants to apply, to the court below, to stay his proceedings or to set them aside as irregular; or he may himself apply to the court below for leave to proceed notwithstanding the appeal, upon the ground that the appellants have not given the requisite security to make the appeal a stay of the proceedings.

What must be the character of a decree to make it a final decree.

Where a decree directs the payment of costs, but does not fix the amount of such costs, and the costs have not been taxed at the time of the appeal, the officer who approves the appeal bond should fix the penalty thereof in a sum at least double the probable amount of the debt and costs decreed to be paid; and should take security accordingly.

THIS was an application on the part of the complainant to dismiss an appeal, by the defendant, from a decree of the assistant vice chancellor. The decree appealed from declared the right of the complainant, as the receiver in a creditor's suit, to certain property in the hands of the defendant, or which had been under his control, or the proceeds thereof; and directed an account to be taken of such property, and that upon the coming in and confirmation of the master's report, the defendant should pay to the complainant, or his solicitor, the amount so reported by the master, together with the complainant's costs, or so much of the amount so reported as would be sufficient to satisfy the amount of the judgment upon which the creditor's bill was filed, with interest and costs. The defendant appealed from the decree,

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and gave a bond, with two sureties, in the penalty of \$2000. And each of the sureties justified in the amount of the penalty of the bond, by an affidavit endorsed upon the bond, and containing all the requisites to show that he was a proper and competent surety to that amount. The bond was approved by the injunction master of the first circuit, as to its form and manner of execution and the sufficiency of the sureties therein. The appeal bond, in addition to the usual condition required by the eighteenth section of the title of the revised statutes, relative to writs of error and appeals, contained the further condition, in conformity with the provisions of the eighty-second section of that title, that if the appellant should fail to prosecute his appeal, or if the same should be dismissed or discontinued, or if the decree appealed from, or any part thereof, should be affirmed, then that the appellant should pay and satisfy the amount directed to be paid by such decree, or the part of such amount as to which such decree should be affirmed. The grounds of the objection to the appeal bond, stated in the notice of the application, were, that the penalty of the bond was not double the amount which the defendant was directed to pay by the decree; that the sureties had not justified in double the penalty of the bond, and that the officer who approved the appeal bond did not certify that each of the sureties named in the bond was worth double the penalty of the bond, over and above all debts and responsibilities.

*J. Rhoades*, for the appellant.

*D. D. Field*, for the respondent.

THE CHANCELLOR. An appeal bond may be good for the purpose of sustaining the appeal, although it be wholly insufficient for the purpose of staying the proceedings, in the court below, upon the decree or order appealed from. To render it valid for the mere purpose of sustaining the appeal, it is sufficient if the bond is in a penalty not less than \$250, with two sufficient and proper sureties, who have justified in at least



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double that sum, and is conditioned to prosecute the appeal, and to pay such costs and damages as may be awarded against the appellant on such appeal. The bond in the present case contains all these requisites, and is properly approved by one of the officers designated by the court for that purpose. As the affidavits of justification, by the sureties, were endorsed upon, and filed with, the bond and the certificate of approval, and showed that each of the sureties was worth the requisite sum, and had all the other qualifications to become such surety, it was not necessary that the officer should state the same thing over again in his certificate of approval. The appeal is therefore, regular and the motion to dismiss it must be denied, with costs.

The question, whether this bond is sufficient to make the appeal a stay of proceedings, does not properly arise here. If the respondent thinks the bond is not sufficient to stay the proceedings upon the decree appealed from, he has two modes in which he can get that question before the proper tribunal for a decision. The one is to proceed as though there was no appeal; leaving it to the adverse party to apply to the vice chancellor to stay the proceedings, or to have them set aside, if he thinks them irregular. The other is to bring the question directly before the vice chancellor for a decision, by an application for leave to proceed under the decree upon the ground that the appellant has not given such security as is required, by the rules and practice of the court, to make the appeal a stay of the proceedings upon the order appealed from.

The decree in question is, undoubtedly, a decree directing the payment of money, although the amount to be paid is not ascertained in the decree itself. It is also a final decree; as it disposes of the question of costs, and gives all the consequential directions upon the coming in and confirmation of the master's report, by the usual order in the clerk's office. (*Mills v. Hoag*, 7 *Paige's Rep.* 18.) The case, therefore, comes within the provisions of the eighty-second section of the revised statutes, relative to appeals. (2 *R. S.* 606.) That section of the statute directs security to be given by a bond, in a penalty of at least

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double the sum decreed to be paid ; which necessarily includes the costs where the payment of costs is decreed. But it makes no provision for the ascertainment of the amount of the penalty of the bond where the sum to be paid is not ascertained by the decree itself, or where the costs have not been taxed at the time of the appeal. This is a casus omissus in the statute, and must therefore be supplied by the court ; so as not to deprive the appellant of the benefit of a stay of proceedings, where he is able and willing to give sufficient security for the payment of the debt and costs which have not been ascertained at the time of the appeal.

In the case of *The City Bank v. Bangs*, (4 *Paige's Rep.* 285,) where the decree only directed the payment of the costs of the suit by the appellant, this court decided that if the costs have not been ascertained by taxation at the time of entering the appeal, the officer who approves the bond, for the stay of proceedings, must fix the penalty thereof in such sum as he shall consider to be at least double the probable amount of the costs directed to be paid by the decree appealed from, in addition to the penalty of the ordinary bond for the costs and damages upon the appeal. And in a case like the present, the officer should also fix the penalty of the appeal bond, when it is intended to stay the proceedings, at a sum which is at least double the probable amount of the debt and costs decreed to be paid ; and must take security accordingly. In the present case it is not material that I should express any opinion upon the question whether this bond is sufficient to stay the proceedings upon the decree ; or whether the act of the legislature, at the last session, fixing the amount in which sureties shall justify upon writs of error, ought to alter the practice of this court in analogous cases. For if the complainant's solicitor is right, as to the amount he will probably be entitled to under the decree of the assistant vice chancellor, the aggregate of \$4000, in which the two sureties have justified, is apparently sufficient to ensure the payment of the amount decreed and the costs of the appeal. And if he is not satisfied with that security, he must proceed in the man-

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ner before indicated, to settle the question whether this bond is technically sufficient to stay proceedings upon the decree appealed from

Order accordingly.

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HAMMERSLEY vs. PARKER.

An order requiring a defendant to show cause why an attachment should not issue against him for a contempt, in not attending before a master pursuant to an order of the court made in a creditor's suit, should give to the defendant at least four days to attend before the master, and to pay the costs, prior to the time appointed for showing cause.

The time for attending before the master, in such a case, may be enlarged by the court, for good cause shown.

The order requiring a defendant to attend before a master and comply with the order of reference in a creditor's suit, and to pay the costs, or show cause why an attachment should not issue against him, should specify the amount of the costs which the defendant is to pay.

Eight dollars is the sum usually inserted in such an order; unless the court, for special reasons, sees fit to direct a larger sum to be paid.

Practice upon proceedings for contempts against defendants for not attending before the master and submitting to an examination, &c. upon a reference to appoint a receiver in a creditor's suit.

THIS was an appeal from an order of a vice chancellor, setting aside an order, for an attachment, which had been made by such vice chancellor, and all subsequent proceedings thereon, for irregularity; with costs. The usual order for the appointment of a receiver, upon a creditor's bill, and for the attendance of the defendant before the master, to assign his property and to be examined in relation thereto, had been entered; and the defendant, being duly summoned, neglected to attend before the master pursuant to the directions contained in the order of reference. The complainant thereupon applied to the vice chancellor and obtained an order, dated the 9th of April, 1845, requiring the defendant to attend before the master, and comply

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with the order of reference, and pay the costs of the application, within four days after service of the copy of the order, or that he should show cause before the vice chancellor, on the 14th of the same month, why an attachment should not issue against him. This order was entered on Wednesday, and was served upon the defendant's solicitor on the same day. But as the time for showing cause before the vice chancellor was for the next Monday thereafter, the defendant had but three judicial days, after the entry of such order, to attend before the master and pay the costs, previous to the time appointed for him to show cause why the attachment should not issue against him. Instead of attending before the vice chancellor, however, to oppose the granting of the order for an attachment, the defendant's solicitor neglected to oppose that application, and suffered the order for the attachment to be taken by default. The defendant having been arrested upon the attachment issued in pursuance of the order of the vice chancellor, subsequently applied for and obtained the order appealed from.

*J. W. Hammersley*, for the appellant.

*T. James Glover*, for the respondent.

**THE CHANCELLOR.** The order for the attachment in this case was not irregular, and the vice chancellor, therefore, erred in setting it aside on that ground. For the order was entered under the direction of the court, and upon due notice of an order to show cause, at that time, why an order for an attachment should not be granted. The error was in the previous order to show cause; which order did not give to the defendant the full four days to attend before the master, and to pay the costs, before the time appointed to show cause against the order for an attachment. And if the defendant's counsel had attended before the vice chancellor on Monday the 14th of April, as he should have done, and showed that he was willing to attend before the master and to comply with the terms of the order and to pay the costs, the vice chancellor would, as a matter of

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course, have enlarged the time for that purpose. The order of the 9th of April was erroneous in another respect; as it did not specify the amount of the costs which the defendant was required to pay. The settled practice of the court is to direct eight dollars to be inserted in the order, unless the court, for special reasons appearing in the papers on which the *ex parte* order is founded, thinks proper to direct a larger sum to be paid. But the amount, even in that case, should be ascertained and inserted in the order, so that the defendant may know what he is to pay, to purge his contempt in not appearing before the master pursuant to the original order of reference and upon the summons of the master.

As mistakes are constantly occurring in relation to proceedings of this kind, it may be proper to state the course to be pursued in such cases. Where the order of reference, or the decree, directs the defendant in a creditor's suit to attend before the master, upon the appointment of a receiver, or to make an assignment of his property, or to be examined in relation thereto, it is his duty to attend upon the day of the return of a summons requiring his personal attendance, or on any other day to which the proceedings are adjourned, or he will be in contempt; and will be liable to be punished for his disobedience of the order of the court. If he has any sufficient excuse, therefore, for not attending before the master at the time required, either by reason of sickness or necessary absence from home, his solicitor or counsel should attend before the master, with the proper evidence of the sufficiency of the excuse. And in such case it will be the duty of the master, if he deems the excuse sufficient, to enlarge the time for attendance. The defendant may also apply to the court for relief, if the master errs in refusing to enlarge the time for attendance, when a sufficient excuse is shown for not attending at the day appointed.

But even where the defendant's solicitor neglects to attend and get the time enlarged, the court will not, in ordinary cases, proceed at once to punish the defendant for his contempt, or to subject him to the extra expenses of an attachment; provided he will attend before the master within a reasonable time, to be

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fixed by the court, and comply with the terms of the order and pay the costs to which the complainant has been subjected in consequence of the previous default. The usual time allowed for that purpose, where the defendant lives in the same city or town with the master before whom he is required to attend, is four days after service of the copy of the order and of the papers upon which it is founded. And where the defendant resides at a greater distance from the master, the court should regulate the time accordingly, in the order to show cause; so as to give the defendant a fair opportunity to comply with the conditions of the order, after the service of the same upon the defendant's solicitor, or upon the defendant himself, or through the post office; according to the provisions of the 191st rule of the court. The complainant, therefore, upon the production of the decree, or order of reference, requiring the defendant to attend before the master, &c. and the master's certificate of his default, and the evidence of the service of the summons, when such evidence is not contained in the official certificate of the master, may apply to the court *ex parte*, and obtain the usual order that the defendant attend before the master within four days after service of the copy of the order and of the papers on which it is founded, or within such other number of days as may have been directed by the court, and make the assignment or submit to the examination on oath, as the case may be, and pay to the complainant eight dollars for the costs to which he has been subjected by such previous default, or show cause before the court, at such time as may be prescribed in the order, and after the expiration of the full number of days allowed for attendance before the master, why an attachment should not issue against him, or why he should not be punished for his misconduct. Where the order specifies the particular motion day on which the defendant is to show cause before the court, it should direct the service to be made within such specified time after the making thereof as to give the defendant, after such service, the full number of days specified in the order to attend before the master prior to the time appointed for showing cause. Or, if it is uncertain when the complainant will be able to serve the

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order and the papers upon which it is founded, such order may direct the defendant to attend before the master, and pay the costs, &c. within the number of days specified, after such service, or that he show cause before the court on the first regular motion day after the expiration of the time for his attendance before the master.

The order in such cases should recite so much of the alleged contempt of the defendant, in neglecting to attend before the master upon the return of the summons, as to apprise him of the misconduct charged, in neglecting to obey the original decree or order of reference. And such decree, or order of reference, must form a part of the papers upon which the order to show cause is founded, and must be served upon the defendant with such order to show cause; as it will be a necessary part of the papers to show that the defendant had been guilty of a contempt, in case he appears before the court to show cause. The statute authorizes the court to proceed either by attachment, or by an order to show cause why the defendant should not be punished for his alleged misconduct. (2 R. S. 536, § 5.) It is regular, therefore, to take the order in either form. But the usual course is to take an order that the defendant show cause why he should not be punished for his alleged misconduct, specified therein, in not attending before the master upon the return day of the summons, or other original default. And upon such an order, if the defendant does not comply with the condition thereof, or appear before the court to show cause, or if he appears and shows no sufficient cause to purge his contempt, an order will be made for his commitment until he complies with the terms of the original decree or order of reference, and pays the costs of the proceedings; which costs are usually fixed at eighteen dollars; in the shape of a fine, to be paid in addition to the sheriff's fees on his commitment. The proceeding by attachment is more expensive, and ought not to be resorted to without some good cause therefor. And if the complainant subjects the defendant to the useless expense of a proceeding by attachment, instead of obtaining an order to show cause why the defendant should not be punished for his misconduct, the court

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may refuse to allow him the extra costs of such proceedings by attachment.

In the case under consideration, the order to set aside the attachment for irregularity, with costs, must be reversed. But as the whole difficulty appears to have arisen from the carelessness of the solicitor in drawing up the original order, without referring to the day of the week on which the four days allowed for attendance before the master would expire, and from not inserting in the order the amount of costs to be paid, the proceedings upon the attachment must be stayed, and the defendant discharged from the same, upon his paying to the complainant's solicitor the eight dollars costs; and attending before the master within four days after service of a copy of the order, to be entered hereon, and submitting to be examined, &c. and to do such other acts as may be required of him by the master. But if the defendant neglects to pay the costs, and to attend before the master, within the time specified, the complainant is to be at liberty to proceed upon his attachment, to punish the defendant for his original contempt in neglecting to attend before the master.

Neither party is to have costs as against the other upon this appeal or upon the motion to the vice chancellor; and the proceedings are to be remitted.

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OTIS vs. FORMAN.

Where a defendant obtains a general decree for costs, at the final hearing, he is entitled to his costs of a successful motion, previously made, to dissolve the injunction, to be taxed as costs in the cause; although nothing was said by the court in reference to costs, upon the decision of that application.

The 199th rule, which provides for the amount of costs where the court directs a motion or petition to be granted or denied with costs, does not apply to such a case. For where the costs of a special motion are allowed as a part of the general costs in the cause, the several items of such costs are to be taxed as a part of the general bill; unless the court directs the contrary.



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**Costs** will not, in general, be given to a defendant upon the dissolution of an injunction, on bill and answer, where the bill was sufficient, upon its face, to entitle the complainant to the injunction.

A charge for engrossing a copy of affidavits used on a special motion, to keep, is not allowable on taxation.

A party is not entitled to charge a separate solicitor's and counsel fee upon an unsuccessful attempt of the opposite party to postpone the hearing of a motion to dissolve an injunction.

A charge for filing the draft of an order is not taxable.

Where a cause is brought to hearing upon pleadings and proofs, the counsel who actually attend are entitled to their fees; although the adverse party does not appear, to argue the cause on his part, but suffers the decree to be taken against him by default.

The solicitor is entitled to his fee if he actually attends when the cause is reached and heard.

Charges for serving copy of decree, and for proof of service, are not taxable, unless it is a decree that the party is required to serve.

Engrossing the enrolment of decree is properly chargeable; and five folios, in addition to the decree itself, are allowed for the enrolment.

Where an amendment of a decree becomes necessary in consequence of an error of the solicitor of the successful party in drawing it up, the costs of such amendment are not taxable against the adverse party.

The statute allows the court of chancery to enforce its decrees by execution. And to entitle a party in whose favor a decree has been made to an execution thereon, it is not necessary that the decree itself should contain an award of execution. The successful party is entitled to an execution as a matter of right, unless the decree itself prohibits the issuing of an execution thereon.

THIS was an application, by the complainant, for a retaxation of the defendant's costs, upon a decree for the dismissal of the complainant's bill. The principal items objected to were, the costs upon a motion made by the defendant, to dissolve an injunction which had been granted in the cause; and nothing was said in the order in relation to the costs of the application.

*O. L. Barbour*, for the complainant.

*W. L. F. Warren*, for the defendant

**THE CHANCELLOR.** The necessary costs of the defendant upon his successful motion to dissolve the injunction were properly taxable, as costs in the cause; although nothing was

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said in reference to costs, upon the decision of that application. The rule as to the taxation of the costs of interlocutory proceedings, as costs in the cause, is stated by the court in the case of *Stafford v. Bryan*, (2 *Paige's Rep.* 52.) It is not usual to give costs to the defendant at the dissolution of an injunction, upon bill and answer, where the bill upon its face was sufficient to entitle the complainant to the injunction. For although the answer fully denies all the equity of the bill, it may, and frequently does, appear from the subsequent proofs that the charges in the bill were true, and that the answer which denied all the equity of the bill was false. But where the defendant succeeds in his defence, he is entitled to his costs of a successful application to dissolve the injunction, to be taxed as costs in the cause, if he obtains a general decree for costs. Nor does the provision of the 199th rule of this court apply to such a case; as it only provides for the amount of costs where the court directs the motion or petition to be granted or denied with costs. But wherever the costs of a special motion are allowed as a part of the general costs in the cause, the several items of such costs are to be taxed as a part of the general bill, unless the court directs the contrary.

The engrossing a copy of the affidavits to keep was not necessary, and should not have been taxed. (*See Root's case*, 8 *Paige*, 629.) The drafts of the affidavits were all that were necessary for the defendant's solicitor to keep. Nor was the defendant entitled to charge a separate solicitor's and counsel fee upon the unsuccessful attempt of the complainant's solicitor to suspend the hearing of the motion, to dissolve the injunction, until a future time. The resisting of such attempt was a part of the duties of the counsel upon the motion which he was employed to make. The charges for filing the draft of the order, and one of the charges for entering it in the minutes, and for the copy of the order and engrossing and service upon the complainant's solicitor, were also improperly allowed upon the taxation.

Where the cause is brought to hearing upon pleadings and proofs, the counsel who actually attend upon such hearing are entitled to their fees; although the adverse party does not ap-

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pear, to argue the cause on his part, but suffers the decree to be taken against him by default. And the solicitor is also entitled to his fee, where he actually attends when the cause is reached and heard. In this case the solicitor has been allowed for his attendance, and fees are also charged for two other persons as counsel. But from the affidavit, I do not understand that two counsel besides the solicitor actually attended upon the argument. The fee to one of the counsel should therefore have been disallowed. Serving a copy of the decree, with notice, and proof of such service, were not taxable; as no such service of the decree was necessary. The engrossing of the enrolment was properly charged; and five folios, in addition to the decree itself, is allowed for the enrolment.

The charge for the disbursements on the proposed amendment of the decree ought not to have been taxed. If an amendment was necessary, it should not be at the expense of the complainant; as the error, if any, was attributable to the defendant's solicitor who drew up the decree. But the solicitor of the defendant was wrong in supposing that any amendment of the decree was necessary, to entitle him to issue an execution to enforce the payment of the costs. The statute allows the court to enforce the performance of its decrees by execution. And to entitle a party, in whose favor a decree has been made, to an execution thereon, it is not necessary that the decree itself shall contain a provision to that effect. The execution to enforce the performance of a decree is a matter of right, under the statute; and the party in whose favor the decree is made is entitled, as of course, to an execution thereon, unless there is something in the decree itself prohibiting the issuing of an execution for a limited period, or until the further order of the court.

The illegal charges embraced in the notice for retaxation, and which should be disallowed, amount to \$16,44; which sum must be deducted from the bill as taxed. And as the complainant has only succeeded as to a part of the items as to which he asked a retaxation, neither party is to have costs as against the other upon this application.

**L'AMOUREUX vs. VAN RENSSELAER and wife and others.**

[See 3 Sandf. Ch. 107.]

**A** trust to receive the rents and profits of real estate, or the interest or income of the proceeds of such estate, comes within the 63d section of the article of the revised statutes relative to uses and trusts. (1 R. S. 730.) And the cestui que trust cannot assign, dispose of, or in any manner mortgage or pledge his interest in the trust property, or in the future income thereof; nor can he contract any debt which will create a lien upon such future income, so as to authorize a creditor to reach it by any proceeding either at law or in equity.

**As** a feme covert cannot create a debt which will be binding upon her personally, her interest in such future rents and profits cannot be reached under the provisions of the 57th section of the article of the revised statutes relative to uses and trusts.

**After** a creditor of a cestui que trust has exhausted his remedy at law, by execution against the property of his debtor, he may, by a creditor's bill, reach the surplus of such debtor's interest, in the rents and profits or income of property which the cestui que trust cannot alienate and dispose of in anticipation; so as to satisfy the judgment out of that part of the income which is not necessary for the education and support of the cestui que trust, from time to time.

**But** as a feme covert cannot pledge or create a charge upon her interest in such a trust, in anticipation of the income which may thereafter accrue, or become payable to her, and as she cannot contract a personal liability upon which a judgment can be recovered, her interest, even in the surplus income which is not necessary for her support, cannot be reached except for a debt contracted before marriage.

**In** all the trusts authorized by the revised statutes, the whole estate, both legal and equitable, is vested in the trustee. The cestui que trust takes no estate or interest in the land; but may enforce the performance of the trust in equity.

**The** cestui que trust has no right to charge the trust property, even for necessary repairs thereon, without the assent of the trustee. Nor can the trustee himself do so, except so far as he is authorized by the terms of the trust.

**THE** bill in this cause was filed to charge the separate estate of a feme covert, in the hands of her trustee, with the amount of an order drawn upon the trustee, by her husband, in her name. The bill was taken as confessed against all of the defendants, and the case was submitted by the complainant for a decree. The questions presented by the bill were, whether the feme covert could charge her trust estate in anticipation, under the provisions of the revised statutes; and whether the order drawn in her name, by her husband, was in conformity with the provisions of the trust deed; which prescribed the manner in which the trustee was to pay over the proceeds and income

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of the property, so far as the feme covert was entitled to the same.

*J. L'Amoureux*, complainant, in person.

THE CHANCELLOR. The bill states that the consideration of the order was repairs, which had been done by another person, on the real estate of Catharine W. Van Rensselaer, then in her occupation, use and enjoyment, with the assent of her husband, and for her use, benefit and convenience. But it is not alleged that the real estate upon which such repairs were made was any part of the trust property originally conveyed to Mr. Rhoades in trust, and now held by Phelps as the substituted trustee. And from the peculiar phraseology of the part of the bill in which the consideration of the order is stated, I am inclined to think the real estate upon which such repairs were made, could not have been any part of the estate which had descended to Mrs. Van Rensselaer as one of the heirs of B. Bleeker; mentioned in the deed of trust. Such repairs, therefore, could not in themselves have constituted an equitable lien upon this trust property in the hands of the substituted trustee.

The trust deed embraced some property which came to Mrs. Van Rensselaer from other sources. But as the order is to pay the complainant out of her proportion of the estate of B. Bleeker, deceased, it is only necessary to examine the provisions of the trust deed as to what was coming to her from that source. Indeed there is no allegation in the bill that any part of the personal estate of B. Bleeker, embraced in the trust deed, remained in the hands of the trustee at the time of the commencement of this suit, or that it had not all been disposed of, pursuant to the directions of the trust, before the order in favor of the complainant was drawn. The only charge in the bill in relation to the existence of any of the trust property, is, that subsequent to the substitution of Phelps as trustee, the real estate of B. Bleeker, deceased, was partitioned by a decree in chancery, among the heirs; and that there was set off to Mrs. Van Rensselaer, or to the trustee, for her share, real estate in Albany, and elsewhere in

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this state, exceeding \$10,000 in value ; which real estate is, now held by the trustee in severalty, for the purposes, and subject to the uses and trusts, mentioned in the deed of trust originally executed by Van Rensselaer and wife to Rhoades as trustee.

The deed of trust purported to convey the real and personal estate absolutely to the trustee, upon trust to take and receive the personal property coming from the estate of B. Bleeker, deceased, as the share of Mrs. Van Rensselaer, when the same should be distributed in due course of administration, and to take possession of her share of the real estate, whenever the same should be partitioned among the heirs, or to receive and invest her share of the proceeds thereof ; and from time to time to receive the rents, profits, and the interest, income and dividends of such real and personal estate, and after paying out of the same all repairs, premiums of insurance, taxes, assessments, and expenses chargeable thereon, and commissions of the trustee, to pay over the residue thereof to Mrs. Van Rensselaer, for her sole and separate use, and upon her separate receipt or order, or by a check payable to her order, free from the *debts, control, engagements, or interference of her husband* ; and so as not to be subject to any contracts made by, or to any judgments or executions against him.

It is very evident that this trust to receive the rents and profits of real estate, or of the proceeds of such estate in case it should be necessary to sell the lands for the purpose of making a partition, comes within the letter as well as the spirit of the sixty-third section of the article of the revised statutes relative to uses and trusts (1 R. S. 730.) The cestui que trust could not therefore assign, dispose of, or in any manner mortgage or pledge her interest in the trust property, or in the future income thereof ; nor could she contract any debt which would create a lien upon such future income, so as to authorize the creditor to reach such income by any proceeding, either at law or in equity. And as a feme covert cannot create a debt which will be binding upon her personally, her interest in such future rents and profits cannot be reached under the provisions of the fifty-seventh section of that article of the revised statutes. For if she was permitted to pledge the

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income of the trust estate, in anticipation, the whole benefit intended to be secured to an improvident cestui que trust, by the sixty-third section, might be defeated. The effect of the fifty-seventh and sixty-third sections, taken together, is, that after the creditor of the cestui que trust has exhausted his remedy at law, by execution against the property of his debtor, he may, by a creditor's bill, reach the surplus income of such debtor's interest in rents and profits or income of property which the cestui que trust cannot alienate and dispose of in anticipation; so as to satisfy the judgment out of that part of the income which may not be necessary from time to time for the education and support of the cestui que trust. But as a feme covert cannot pledge or create a charge upon her interest in such a trust, in anticipation of the income which may thereafter accrue or become payable to her, and as she cannot contract a personal liability upon which a judgment can be recovered, her interest, even in the surplus income which is not necessary for her support, cannot be reached except for a debt contracted before marriage.

Previous to the adoption of the revised statutes a trustee might hold the mere naked legal estate in real property, for a feme covert, while the whole equitable interest and estate therein was in her, and subject to her control. In relation to such an estate, therefore, she was considered as a feme sole, and could charge her equitable interest in the property with any debt she might think proper to contract on the credit thereof, which was not inconsistent with the trust or with the nature of her interest in the premises, and which was authorized by the instrument or conveyance creating the trust. All such mere formal trusts, even in favor of femes covert, are now abolished. And in the few trusts which are authorized by the revised statutes, the whole estate, both legal and equitable, is vested in the trustee. The statute also declares, in terms, that the person for whose benefit the trust is created, shall take no estate or interest in the land; but may enforce the performance of the trust in equity. (1 R. S. 729, § 60.) The cestui que trust, therefore, has no right to charge the trust property, even for necessary re-

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In the matter of Russell.

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pairs thereon, without the authority of the trustee. Nor can such trustee himself do so, except so far as he is authorized by the terms of the trust. And in this case, as I have before remarked, it is not alleged in the bill that the repairs for which this order was given were made upon any of the real property embraced in the trust.

As the bill does not show a case entitling the complainant to any relief as against the trustee, or the trust property which such trustee holds for the benefit of Mrs. Van Rensselaer, the bill must be dismissed; but without prejudice to his remedy at law, if he has any, to obtain payment of his debt.

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In the matter of RUSSELL, a lunatic.

A person proceeded against as a lunatic, except in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time to produce his witnesses before the jury. But it is not necessary that notice should be served on him personally where it is evident: he keeps out of the way to avoid service of the notice.

The jury, upon the execution of a commission of lunacy, have a right to inspect and examine the lunatic; and they should do so, in every case of doubt, when practicable.

In such cases they should direct the person in whose custody the lunatic is, to produce him, or to permit him to attend before them. And when such an order is made, either by the court or by the commissioners, the person who prevents the attendance of the lunatic before the commissioners and jury will do it at his peril.

This court has a right to discharge an inquisition of lunacy, upon a mere examination of the alleged lunatic, in connection with the evidence produced before the jury; without subjecting him to the expense of an issue or a traverse, where upon such an examination and evidence it is evident that the jury erred.

But where no change has taken place in the situation of the lunatic, since the execution of the commission, it must be a very clear case of mistake, or of undue prejudice, on the part of the jury, to authorize the court to do so.

The court will not discharge an inquisition upon *ex parte* affidavits, contradicting the finding of the jury, without any excuse being given for neglecting to produce the deponents as witnesses before the commissioners.

Although it is not a matter of course to allow a feigned issue in a lunacy case, when



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asked for, it is proper to allow it whenever the court entertains a reasonable doubt as to the justice of the finding of the jury, upon the execution of the commission.

THIS case came before the chancellor upon an inquisition finding P. Russell to be a lunatic, and upon the petition of one of his sons, on whose application the commission was issued, to have a committee of his person and estate appointed. A counter application was made on the part of Russell to have the inquisition set aside for irregularity, or for leave to traverse, or for a feigned issue to try the question of lunacy.

*J. Holmes*, for the original petitioner.

*I. D. Willard*, for the alleged lunatic.

THE CHANCELLOR. There is no irregularity in the proceedings, which can justify the court in setting aside the inquisition on that ground. The alleged lunatic, except in cases of confirmed and dangerous madness, to be judged of and provided for by the court, in the order for the commission, is entitled to reasonable notice of the time and place of the execution of the commission, and a reasonable time to produce his witnesses before the jury, to rebut the charge of lunacy. It is not necessary, however, that the notice should be served on him personally, where it is evident he keeps out of the way to prevent the service of notice of the execution of the commission. Here the notice was served at the place where Russell made it his home, and also at the several places where he would be most likely to receive it. And the evidence produced before the commissioners was sufficient to establish the fact that he must have been aware of the existence of the notices which had been left at those places for him, or of some of them. The jury also have the right to inspect and examine the lunatic; and they should do so in every case of doubt, where such an examination can be had. And in such cases the commissioners should direct the person in whose custody the lunatic is, to produce him, or to permit him to attend upon the execution of the commission.

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Where such an order is made, either by the court, or by the commissioners without a previous direction of this court, the person who prevents the attendance of the lunatic before the commissioners and jury will do it at his peril.

I have no doubt of the right of the court to discharge an inquisition of lunacy upon the mere examination of the supposed lunatic, in connection with the evidence produced before the jury, without subjecting him to the expense of an issue or a traverse; where upon such examination and proof it is perfectly evident that the jury erred in finding him to be a lunatic. (*In Re Heli*, 3 Atk. 635.) But to authorize the court to dispose of the case thus summarily, where there has been no change in the situation of the alleged lunatic subsequent to the finding of the inquisition, it must be a very clear case of mistake or undue prejudice on the part of the jury. It is also improper, in a case of this kind, to discharge the inquisition upon ex parte affidavits contradicting the finding of the jury; where there is no reasonable excuse given for the neglect to produce the deponents before the commissioners, and the jury, for examination as witnesses. The present is therefore not a proper case for the discharge of the inquisition upon this hearing, and without a traverse.

The only remaining questions, therefore, are whether the alleged lunatic should be permitted to traverse the inquisition and if so, upon what terms and conditions; or rather, whether a feigned issue should be awarded to try the question of insanity which is the form in which the question is tried, in a court of law, by our practice. Although it is not a matter of course to allow a feigned issue if it is asked for, it is proper to allow it wherever the court entertains a reasonable doubt as to the justice of the finding of the jury, upon the execution of the commission. In the case under consideration I have not only read the testimony upon which the inquisition was founded, but have also examined the party proceeded against, in relation to the particular subject upon which he is supposed to be insane. For it is admitted by the counsel for the petitioners, that the testimony produced upon the execution of the commission did not

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establish a case of general insanity. The mental alienation, if any, in this case, is of that character to which Professor Esquirol has given the modern name of *monomania*, or partial insanity, as distinguished from *polymania*, or general mental alienation. In this species of insanity the delusion of the mind is confined to a particular subject, or an isolated train of ideas; and which some medical writers suppose leaves the intellect unaffected in other respects. Because persons thus afflicted frequently appear perfectly rational on all other subjects, both in their conversation and actions. But persons in this situation frequently become passionate, and even dangerous, when the train of their particular delusion has been touched; so that for a time they may exhibit all the fury and violence of raving maniacs. It is very difficult, therefore, as Sir Matthew Hale very justly observes, to define the invisible line which divides perfect from partial insanity. Where the particular subject of the insane delusion, or monomania, connects itself, however, with the disposition or management of the property of the person who is thus afflicted, he is a proper subject of a commission of lunacy. For his unsoundness of mind renders him incompetent to manage or dispose of his property with reason and judgment. (*Dew v. Clark*, 3 *Addams' Eccl. Rep.* 79. 1 *Hagg. Eccl. Rep.* 311, and 5 *Russ. Rep.* 163, *S. C.*)

In the case under consideration, the monomania or insane delusion, if it be such, assumes the form of a fixed and abiding idea, in the mind of Mr. Russell, that his wife, who has nearly reached the age of sixty, and who is the mother of a large family of grown up children, has for the last two or three years been carrying on a criminal intercourse with a member of the church to which she belongs. And the effect of this strange and unaccountable delusion has been to sever the ties of affection and of nature which once attached him to his wife and children, and to cause him to sell his homestead and other property, with a view to the final abandonment of his family and his home. The evidence upon the execution of the commission, if the facts there stated were the only grounds upon which his settled conclusion of his wife's guilt was based, showed that such a conclusion

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was not only unfounded, but was so clearly absurd and irrational as to be attributable only to the insane delusion of a diseased intellect. In my private examination, therefore, I have endeavored to ascertain the origin of his delusion on this subject, and to trace down the consecutive series of his actions and associations of ideas on the particular subject of his supposed mental alienation; but without arriving at a satisfactory conclusion whether the opinion which has fixed itself in his mind is merely the result of false reasoning from facts which could not justify such a conclusion, or whether the supposed facts, as well as the erroneous and absurd conclusions based thereon, were not the mere creations of an impaired intellect. It is therefore a proper case for the awarding of a feigned issue.

An issue must be made up and tried, at the circuit in Rensselaer county, to determine the question whether Mr. Russell is of unsound mind, so as to be mentally incapable of governing himself or of managing his property and affairs. And the only condition which I shall annex to the order is that he shall attend personally upon the trial of the issue, and submit to such examination before the jury as the judge who tries the issue shall think proper to direct. In the meantime it may be referred to Master Kellogg to report a proper person as the committee, to take charge of such parts of Mr. Russell's estate as it is necessary to preserve from loss. And such committee is to take charge of the moneys now in possession of the alleged lunatic, and pay out of the same what is necessary for his board and clothing, and such reasonable sums as may be requisite to procure the attendance of witnesses upon the trial, and for the employment of proper counsel for him before the court and jury.

In the matter of WHITE, an habitual drunkard.

The bond given by the committee of a lunatic or an habitual drunkard should be made payable to the people of the state, or to the register or clerk in whose office it is to be filed.

AN application was made in this case for the appointment of a committee of the person and estate of an habitual drunkard; and the order as proposed by the solicitor for the petitioner directed the bond of the committee and his sureties to be made payable to the drunkard, and to be filed with the register.

The CHANCELLOR said this direction in the order was wrong, and that the bond should be given either to the people, or to the register or clerk of the court with whom such bond was to be filed; that the practice in England was to take a recognizance from the committee of a lunatic or idiot and his sureties, so as to have it the more effectually under the control of the chancellor. That by the practice of this court a bond had been substituted; and that in analogy to the practice in England, the proper course was to make the bond payable to the people of the state, or to the officer of the court in whose office it was to be filed.

Order accordingly.

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ALDRICH vs. REYNOLDS.

To render a contract usurious, both parties must be cognizant of the facts which constitute the usury.

If a bona fide holder of a negotiable note which was tainted with usury in the hands of the original payee, receives from the maker a new security for the debt and gives up the note, without any knowledge of the usury, the security which he takes in lieu of it is not usurious.

THIS was a motion to dissolve an injunction upon bill and answer. The object of the injunction was to stay the defen-

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Aldrich v. Reynolds.

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dant from proceeding at law to foreclose a mortgage under the statute, upon the ground of alleged usury in the mortgage. The bill charged that a part of the consideration of the mortgage was an usurious negotiable note given by the complainant to T. Ells, and endorsed by the latter and sold to the defendant. The defendant denied that he had any notice of the alleged usury in the note; and insisted that he was a bona fide holder of the note, for a valuable consideration; that he subsequently got it discounted at the bank, and the note not being paid when it became due, Ells and himself were duly charged as endorser; together with another endorser whose endorsement Ells had procured previous to the sale of the note to the complainant.

*S. P. Nash*, for the complainant.

*O. L. Barbour*, for the defendant.

THE CHANCELLOR. If the statement in the answer is true, and it must be taken to be so upon this application, this mortgage is not usurious, although the money secured by it includes the usurious premium which was originally embraced in the note to Ells. To render a contract usurious, both parties to the contract must be cognizant of the facts which constitute the usury. And if a bona fide holder of a negotiable note, which was tainted with usury in the hands of the original payee, receives from the maker a new security for the debt, and gives up the note, without any knowledge of the usury, the security which he takes in lieu of it is not usurious. (*Cuthbert v. Haley*, 8 T. R. 390.) It is true the defendant could not have recovered against the maker of the note, in this case, upon the original contract; which was void even in the hands of a bona fide holder. But he had a perfect right to recover the amount of the note against Ells or the other endorser. And it was entirely immaterial whether the defendant paid the money to the bank, himself, and then discharged the endorsers by giving up the note to the complainant upon the receipt of the new security, or lent the money to the complainant to take up his note, at the bank, as is

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stated in the answer of the defendant. For, in either event, the original liability of the endorsers would be discharged, and the defendant must rely upon his bond and mortgage alone for the recovery of his debt.

The bond and mortgage, given to a stranger to the original contract, not being subject to the charge of usury on account of the extra premium which was inserted in the note given to Ells, and all the other charges of usury stated in the complainant's bill being fully met by a positive denial in the answer of the defendant, the motion to dissolve the injunction must be granted. And the costs of this application are to abide the event of the suit.

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 COOPE vs. LOWERRE.
 

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Under the provisions of the revised statutes, which prescribe the order in which administration, in cases of intestacy, shall be granted to the relatives of the deceased, if they, or any of them, will accept the same, and which provide that letters of administration shall not be granted to a person *convicted* of an infamous crime, nor to any one incapable by law of making a contract, nor to a non-resident alien, nor to a minor, nor to any one who shall be adjudged incompetent, by the surrogate, to execute the duties of such trust by reason of drunkenness, *improvidence*, or want of understanding, nor to a married woman, the surrogate has no discretion to exclude a person, declared by the statute to be entitled to a preference, except for some of the causes specified in the statute.

No degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration, as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime.

The conviction intended by the statute is upon an indictment or other criminal proceeding.

The improvidence contemplated by the statute, as a ground of exclusion, is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value, by improvidence, in case administration thereof should be committed to the improvident person.

Where a surrogate has a discretion, to select between two or more individuals of the same class, he may properly take into consideration moral fitness in making such selection.

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Coope v. Lowerre.

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THIS was an appeal from a decision of the surrogate of the city and county of New-York, appointing the respondent administrator of the estate of his deceased father. The intestate left three children surviving him, one daughter, the wife of the appellant, and two sons; the respondent, and a younger son who was admitted to be incompetent. The appellant applied for letters of administration, on the estate, in right of his wife. And upon the return of the citation, directed to the two sons, the respondent appeared and claimed the administration for himself as being entitled to a preference under the provisions of the revised statutes. The appellant resisted his claim, on the ground that he was disqualified on account of his vices and his improvidence. Much testimony was taken for the purpose of showing that the respondent had been guilty of various offences, and that he was totally unworthy of the trust, on account of his imputed vices. But the principal evidence to show he was improvident arose from his own examination, upon an application for a discharge from his debts under the insolvent act. The surrogate decided that there was not sufficient evidence to show the respondent was improvident; and that as he had not been convicted of an infamous crime, he was entitled to administer upon the estate in preference to the husband of his sister.

*Edward Sandford*, for the appellant.

*Horace F. Clark*, for the respondent.

THE CHANCELLOR. The revised statutes provide that administration, in case of intestacy, shall be granted to the relatives of the deceased who would be entitled to his personal estate, if they or any of them will accept the same, in the order specified in the statute. And I think the surrogate has no discretion to exclude a person, declared by the statute to be entitled to a preference, except for the causes specified in the thirty-second section of the title of the revised statutes relative to granting letters testamentary and of administration. (2 R. S. 75.) That section provides that no letters of administration



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shall be granted to a person *convicted* of an infamous crime, nor to any one incapable by law of making a contract, nor to a person who is not a citizen of the United States, unless he resides in this state, nor to a minor, nor to any one who shall be adjudged incompetent, by the surrogate, to execute the duties of such trust by reason of drunkenness, *improvidence*, or want of understanding, nor to a married woman. But where a married woman is entitled to administration the same may be granted to her husband in her right and behalf. No degree of legal or moral guilt or delinquency, therefore, is sufficient to exclude a person from the administration, as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime. And the conviction intended by the statute must be upon an indictment, or other criminal proceeding. Where the surrogate, however, has a discretion to select between two or more individuals of the same class, he may very properly take into consideration moral fitness in making such selection. Neither the recovery upon the note alleged to have been taken from the desk of the respondent's father, nor the verdict in the suit for the seduction of the wife of his neighbor, nor even the decision of the jury upon his application for a discharge under the insolvent act, is sufficient to disqualify him to receive the grant of administration upon his father's estate. Nor is the verdict, in the first or in the last of those cases, any evidence whatever of that kind of improvidence which the statute has declared a sufficient cause of exclusion from the administration of an estate. The improvidence which the framers of the revised statutes had in contemplation, as a ground of exclusion, is that want of care or foresight, in the management of property, which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person. The principle of exclusion, in this part of the statute, is based upon the well known fact that a man who is careless and improvident, or who is wanting in ordinary care and forecast in the acquisition and preservation of property for himself, cannot

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with safety be entrusted with the management and preservation of the property of others.

The fact that a man is dishonest, and seeks to obtain the possession of the property of others by theft, robbery, or fraud, is not evidence either of his providence or of his improvidence. For the dishonest man, who preys upon the rights of others and deprives them of their property by unlawful means, may be, and frequently is, not only careless but perfectly reckless in squandering the property which he has thus acquired. Or he may, on the other hand, preserve and hoard up his ill gotten gains with all a miser's care. The evidence in this case tending to show the respondent's dishonesty, and that he had been guilty of divers offences against the laws of society, but which could not throw any light upon the question of his providence or improvidence, should therefore have been excluded by the surrogate. Upon the same principle, the record of the large recovery against him in the crim. con. case, was improperly received as evidence before the surrogate; as it did not throw any light upon the question under consideration there. For that record only showed that, in a single case, the respondent had been found guilty of the deep moral offence of gratifying his criminal passions at the expense of a very heavy draft upon his purse. The case would have been very different if he had been guilty of frequent offences of this sort, and at considerable expense of property, from time to time. For that would have been evidence of great improvidence, as well as of deep degradation and guilt; and might have furnished reasonable grounds for believing that he was an unsafe and improper person to be entrusted with the administration of his father's estate.

The only real and legitimate evidence of the respondent's improvidence, in the acquisition and preservation of property, is that derived from his own examination when he was applying for the benefit of the insolvent act. And in reference to what he then said, it does not lie in his mouth, or that of his counsel, to say that the story he then told, in relation to the loss of his property, or as to the contracting of the debts which were signed off by his supposed creditors, was a mere fiction. For it must be

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 Outtrin v. Graves.
 

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recollected he was examined upon oath; and that a deviation from the truth, upon that examination, involved the legal as well as the moral guilt of perjury. Taking what the respondent there stated to be true, he certainly was grossly negligent in the management of his property and affairs, and in the contracting of debts, by endorsing for strangers, or for men without visible means of payment. But after all, I cannot bring my mind to the conclusion that he is improvident to such a degree as to render him incompetent to discharge the duty of an administrator.

The decision of the surrogate must therefore be affirmed. But this being a new question, under the provisions of the revised statutes, and the examination of the respondent before the recorder furnishing very considerable evidence of improvidence, I do not think it is a proper case to charge the 'appellant with costs upon this appeal.

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 OUTTRIN vs. GRAVES, committee, &c.
 

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Where a bill was filed against the committee of a lunatic, to correct an alleged error in the amount of a mortgage, taken by the committee upon the sale of the lunatic's estate under an order of a vice chancellor, and such bill was dismissed upon the merits, and where the mortgagor had appealed from the decision, which appeal was still pending, the chancellor refused to grant an injunction to restrain the committee from proceeding to foreclose the mortgage under the statute.

It is not necessary for a purchaser from a committee, under an order of the court of chancery, to file a bill to obtain an equitable deduction from a security taken upon the sale; but the court may give relief upon a summary application.

But a committee who has consented to have the rights of the parties litigated upon a bill filed, cannot afterwards object that he had been proceeded against, in that manner, without leave of the court by which he was appointed.

Where the committee of a lunatic is sued by bill, when the right of the adverse party might have been settled upon a summary application to the court, it may be a good reason for refusing costs to the complainant, although he succeeds in the suit.

THIS was an application, on the part of the complainant, for an injunction or order restraining the defendant from proceeding

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Outtrin v. Graves.

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at law to foreclose a mortgage, according to the statute, under the following circumstances. In 1839, R. H. Nicholas was the committee of the estate of R. Nicholas, his father, who had been found an habitual drunkard; upon a commission granted by the vice chancellor of the fifth circuit. In the latter part of November, of that year, the committee obtained an order authorizing the sale of the real estate of his father, consisting partly of freehold and partly of leasehold lands; but requiring the committee to report the particulars of the sale to the vice chancellor, for his confirmation, before the conveyance was executed. The freehold land was described in the deed thereof to R. Nicholas, the drunkard, as 155 acres; out of which, forty acres had been subsequently sold to his son. And in the negotiation with the complainant, for the sale to him, the committee stated the freehold land to contain 115 acres. The complainant offered to give, for the whole premises, at the rate of \$24 an acre for the freehold lands only; and the leasehold were to be thrown in without any additional compensation. This offer was accepted, and a written contract was entered into and signed, by the complainant and the committee, for a sale of the leasehold and freehold lands together, at the price of \$2760. Of this sum \$1400 was to be paid upon the execution of the conveyance, and the residue was to be secured by bond and mortgage. The agreement was reported to the vice chancellor, and confirmed; and a deed was executed accordingly. The complainant paid the \$1400, and gave his bond and mortgage for the payment of \$1360, with annual interest; the principal to be paid in four yearly payments, commencing on the first of January, 1842. The complainant alleged that it was a part of the agreement that he was only to pay for the number of acres of freehold lands actually contained in the farm, at the rate of \$24 per acre; and that upon an actual survey thereof, in 1842, it appeared there were but 104 acres and a half. The defendant in the present suit, a substituted committee, having filed a bill before the vice chancellor to foreclose the mortgage, for the non-payment of the instalments which had then become due, the bill in this cause was filed against him and the former com-

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mittee; charging the latter with fraud, in procuring the contract, by falsely representing the lot to contain 115 acres, when he knew it contained less, and praying to have the bond and mortgage cancelled upon payment of what would be due after deducting therefrom the amount included therein for the ten acres and a half which the lot fell short of 115 acres. A stipulation was subsequently entered into, between the complainant in this suit and the committee, by which it was agreed that the former should pay the costs of the foreclosure suit, and so much of the instalment which had become payable as was admitted by the complainant to be then equitably due upon the bond and mortgage, and that the foreclosure suit should be discontinued; it being declared in such stipulation to be the intention of the parties to have all their rights settled in this cross suit. That arrangement was carried into effect, and the foreclosure suit was discontinued.

This suit was subsequently proceeded in, and the bill was dismissed by the vice chancellor, as to the former committee. The substituted committee put in an answer, and the cause was heard upon pleadings and proofs, as to him. And the vice chancellor subsequently made a decree dismissing the complainant's bill as to the substituted committee also, but without costs. From that decree the complainant appealed to the chancellor; which appeal was still pending when this application was made.

*O. L. Barbour*, for the complainant.

*N. F. Graves*, for the defendant.

**THE CHANCELLOR.** The application for an injunction to stay the sale of the mortgaged premises, under the statute foreclosure, must be denied. Without going into the merits of the case upon the appeal, the presumption is that the decision of the vice chancellor was correct, and that the complainant had no legal or equitable claim to a decree in his favor, in this suit. This court therefore cannot, in this summary way, review the decision of the vice chancellor, and grant an injunction to stay

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the defendant's proceedings upon the statute foreclosure. The only course for the complainant is to pay the balance which is due upon the bond and mortgage, and the costs of foreclosure; and run the risk of recovering it back from the committee, in case he succeeds upon the appeal. And if he has any valid claim to stay the committee from parting with the proceeds of the bond and mortgage, or so much thereof as may be necessary to meet the anticipated decree in his favor upon the appeal, his remedy must be by a summary application to the vice chancellor, by whom the committee was appointed, for an order to stay, in the hands of such committee, so much of the fund as may be necessary to meet the anticipated deduction, in case the complainant succeeds upon his appeal.

Indeed it was not necessary to file a bill, for the purpose of obtaining an equitable deduction from the amount apparently due upon the bond and mortgage, if any error had occurred therein, either by the fraud of the former committee, or otherwise. For as the committee was the mere officer or agent of the court in making the sale of the estate of the drunkard, the vice chancellor by whom the committee was appointed, was authorized, upon a mere petition of the purchaser, to ascertain and decide the question as to the validity of his claim to relief. And the facts of the case, if disputed, could have been ascertained by a reference to a master. The committee, however, after consenting to have the rights of the parties litigated in this suit, could not, at the hearing, object that the complainant had proceeded against him by bill, without the previous leave of the court, instead of applying to the vice chancellor, by petition, to direct the committee to make such deduction from the bond and mortgage as might be just and equitable, under the circumstances of the case. But the objection that the complainant had adopted the more expensive course of a proceeding by bill, instead of making a summary application to the vice chancellor, by petition, might have been a good ground for refusing him his costs in the suit; if he had succeeded in obtaining a deduction from the amount claimed to be due upon the bond and mortgage.

The application for the injunction must be denied with \$12

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costs. But it must be without prejudice to the right of the petitioner to make such an application to the vice chancellor as he may be advised is proper, to stay the committee from paying away the moneys, which may be received by him upon the bond and mortgage, until after the decision of the chancellor upon the appeal from the decree.

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## HALL vs. FISHER &amp; FISHER.

[s. c. 3 Barb. Ch. 637.]

**An injunction will not be granted, to restrain a party from instituting proceedings in equity for an account, &c. where the complainant has an equitable defence to such proceedings, which he can set up in his answer.**

**A deputy sheriff, who sells real estate upon an execution, has the right to authorize a deposit of the redemption money with another person, as his agent for that purpose. And a deposit of the money with such agent, within the time allowed by law for redeeming, will be a valid payment to the deputy, and will constitute a good redemption of the premises from the sale.**

**Where the sheriff makes a miscalculation of the interest, upon the sum bid by a purchaser, and thereby misleads a party coming to redeem, who in consequence thereof makes a short payment, it seems the redemption will, notwithstanding, be held valid and effectual, even at law.**

**But where the redeeming party makes the calculation for himself, or by an agent employed by him for that purpose, and a mistake occurs, in consequence of which a sum less than the amount due is paid, the redemption will be invalid.**

**Whether the court out of which the execution issued, could upon an application made, previous to the execution of the sheriff's deed, relieve the redeeming party against the consequences of such a mistake? *Quære.***

**Whether a court of equity has power to grant such relief, after the execution of the sheriff's deed to the purchaser? *Quære.***

**No injunction should be granted, in such a case, to restrain a suit at law to compel the redeeming party to account for and pay over to the purchaser the rents and profits of the premises sold, without an allegation in the bill showing that the defence of the complainant at law is imperfect, or doubtful.**

THIS was an application to dissolve an injunction upon bill and answer. The object of the bill was to compel the defendant H. Fisher to release to the complainant the equal and undivided fourth of certain ore beds in Essex county. The lot

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upon which the ore beds were situated originally belonged to H. Fisher; who, in October, 1837, conveyed to Joseph Hall and Ephraim Hall the undivided one fourth of the ore beds upon the lot, together with the privilege of necessary roads, to and from the ore beds, and such timber, &c. as might be necessary in digging and conveying away the ore; with the privileges and appurtenances. A judgment was subsequently recovered in the supreme court, by J. Brown, against the grantees in that conveyance, and it became a lien upon their interest in the premises, in February, 1838. Under this judgment that interest was sold by the sheriff, on the first of September in the same year, and was bid in for the sum of \$39 by the defendant C. Fisher; who purchased in his own name, but in fact for the benefit of H. Fisher his father, by whom he was sent to bid in the property for him. Previous to this sale, but subsequent to the docketing of the judgment, Ephraim Hall had conveyed to the complainant all his interest in the premises. On the 10th of August, 1839, the complainant, for himself and as the agent of his father Joseph Hall, applied to the deputy sheriff who sold the premises upon the execution on the judgment, and offered to pay him the requisite amount to redeem the premises from such sale. But as the deputy had not the certificate, and did not know the amount to be paid, he told the complainant to call at the county clerk's office, where the certificate was filed, and deposit the amount with such clerk; for him, the deputy sheriff. And, as the bill alleged, the complainant called at the clerk's office the same day, and informed the clerk of the directions he had received from the deputy sheriff, and offered to deposit with him the amount of money necessary to redeem the premises; the clerk examined the certificate and computed the amount, which the complainant deposited with him to redeem the premises for himself and for the owner of the other eighth part thereof, the complainant believing the amount thus computed to be the true sum necessary to redeem the premises. He also took the clerk's receipt for the amount so paid; which receipt he delivered to the deputy sheriff on the 17th of the same month, and took his receipt therefor; specifying that it was for the purchase



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money mentioned in the sheriff's certificate of sale, and the interest thereon at the rate of ten per cent. The complainant also alleged, in his bill, that if the sum paid by him for the redemption of the premises from the sale fell short of the amount of principal and interest due and intended to be paid, the deficiency was not more than thirty cents, and was an accidental error or omission, unknown to him until after the time of redemption had expired; and that such error was occasioned purely by the mistake of the county clerk in computing the amount of interest. He also alleged that in June, 1841, believing that the redemption which had been made was valid, he purchased and took a conveyance from his father Joseph Hall of his one eighth of the ore beds, with their appurtenances.

At the time of the alleged redemption, the complainant was in possession of the whole of the lot upon which the ore beds were situated, and of three fourths of the ore beds, under a lease of the same from the defendant H. Fisher; and of the other one fourth of the ore beds under his father, and in his own right. And after the expiration of the lease of the other three fourths, he continued in possession of that fourth of the ore beds, claiming to be the owner thereof as a tenant in common with H. Fisher, whom he admitted to be the owner of the other three fourths, and of the lot upon which they were situated. In January, 1843, the sheriff, who denied the validity of the alleged redemption by the complainant, conveyed the one fourth of the ore beds, with their appurtenances, to C. Fisher, pursuant to the sale made in September, 1838; who shortly thereafter conveyed the same to his father, for whom he purchased at the sheriff's sale. The complainant, subsequently, upon being informed that the validity of the redemption was disputed, tendered to H. Fisher a sum sufficient to pay the whole redemption money due on the 10th of August, 1839, and the legal interest thereon subsequent to that time, and demanded a release of the premises embraced in the sheriff's deed. H. Fisher refused to accept the money, and insisted upon his right to the possession of the whole of the ore beds; and to an account and payment of the profits arising from the use of the three fourths

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thereof subsequent to the conveyance to him from his son. The complainant thereupon filed his bill, in this cause, and obtained an injunction restraining H. Fisher from prosecuting any action or proceeding, either at law or in equity, to compel the complainant to account for and pay the profits of this portion of the premises.

*G. A. Simmons*, for the complainant.

*A. C. Hand*, for the defendants.

**THE CHANCELLOR.** The injunction was clearly wrong, so far as it restrained the defendant H. Fisher from instituting any proceeding in equity to compel an account and payment of the profits of the one fourth of the ore beds which are in controversy. For if the complainant had an equitable defence to such a suit, it was perfectly competent for him to set it up in answer to a bill filed by the adverse party for such an account. And even if it was necessary to set aside the sheriff's deed, as improperly executed after a valid and effectual redemption of the premises, that object could have been effected by filing a cross-bill.

So far as relates to the right of the deputy sheriff, who sold the premises, to authorize the deposit of the redemption money with the county clerk, as his agent, I should have very little difficulty in coming to the conclusion that such a deposit must be considered as a valid payment to the deputy. The money, between the time of redemption and of the payment thereof to the purchaser at the sheriff's sale, in satisfaction of his bid, must remain somewhere for safe keeping. And if the sheriff had directed the redeeming creditor to deposit the money in a bank, for the sheriff, and to obtain a certificate of such deposit, I think if the redemption money had been so deposited, and the receipt of the proper officer of the bank furnished to the sheriff, within the time allowed by law for redeeming, it should be, at law as well as in equity, construed as a valid payment to the sheriff; so as to render the redemption effectual. A gen

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eral deputy of the sheriff may constitute another person his special agent to hold money for him as a mere depositary. And the fact that such agent is not a man of pecuniary responsibility, does not constitute a legal objection to him, where there is no reason to suppose he will use or misapply the money before it is wanted by the sheriff to pay over to the person entitled to the same. If there was, therefore, a distinct and positive allegation in this bill that the complainant actually paid over to the county clerk the whole amount of the bid, with interest thereon at the rate of ten per cent per annum from the day of the sale, I should not hesitate to declare that the premises were regularly and legally redeemed from the sale. That point, however, is left doubtful in the bill; and I find nothing in the bill to show that the deputy sheriff either constituted or intended to constitute the county clerk his agent, to compute and ascertain the amount which was necessary to be paid to redeem the property. The charge in the bill is that the deputy sheriff directed the complainant to go to the clerk's office, where the certificate was on file, and deposit the amount of the redemption money with the county clerk. The clerk, therefore, being the mere agent of the deputy sheriff to receive the redemption money, after the complainant should have ascertained the amount thereof by an examination of the certificate on file, if the complainant employed such clerk to compute the interest, instead of computing it himself, he is in no better situation than if he had relied upon his own computation; and had made a short payment in consequence of a similar error in the computation.

Where the sheriff himself makes a miscalculation of the interest, and thereby misleads the party coming to redeem, there may be good reason for holding the redemption valid and effectual, even at law; and for charging the sheriff with the deficiency, arising from a short payment through his miscalculation, exclusively. But where, as in this case, the redeeming party is left to make the calculation for himself, or by an agent employed by him for that purpose, I think the redemption is invalid at law; and that the purchaser, who obtains the sheriff's deed of the premises, is entitled to the legal estate. Whether the

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court out of which the execution issued, upon an application to its equitable powers previous to the execution of the sheriff's deed, can relieve the person entitled to redeem, against the consequences of such a mistake, or whether this court has any power to grant such relief, after the execution of a sheriff's deed passing the legal title of the premises to the purchaser, are questions which do not properly arise upon this application. For, it does not distinctly appear from the complainant's bill whether any such mistake has in fact occurred in this case. To raise that question, and to show that the complainant had not a perfect defence at law, he should have stated in his bill that, by a mere mistake in computing the interest, the amount of the redemption money was short of the sum required to make up the full sum mentioned in the sheriff's certificate with interest thereon at the rate of ten per cent per annum; or the complainant should at least have stated that it was doubtful whether the amount paid by him was not too small, owing to an error of the county clerk in computing the interest.

In the absence of such an allegation, showing that the defence of the complainant at law was imperfect, or at least doubtful, the injunction should be dissolved, so as to enable the parties to settle their legal rights in a court of law. The motion to dissolve the injunction must therefore be granted; but without prejudice to the right of the complainant to apply to renew it, upon an amended bill containing the proper allegations in this respect.

MURRAY & BLUNT *vs.* HAY

[Followed, 4 Sandf. Ch. 385.]

An order to produce witnesses may be either in the form originally used, requiring the *adverse* party to produce witnesses within forty days, or in the more modern form requiring *the parties* to do so.

There is no inflexible rule as to joinder of parties in the court of chancery. Yet, as a general principle, several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for the separate relief of each.

Nor can a single complainant, having distinct and independent claims to relief against two or more defendants severally, join them in the same bill.

But there are many exceptions to this rule; and the court exercises a sound discretion, in determining whether there is a misjoinder of parties, under the particular circumstances of each case.

Two or more judgment creditors, having separate judgments, may join in a bill to reach the equitable interests and choses in action of their common debtor, after they have exhausted their remedies at law, by execution, upon their respective judgments.

Two or more persons having separate and distinct tenements, which are injured, or rendered uninhabitable, by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the tenements of both, may join in a suit to restrain such nuisance.

The insertion of a prayer for multifarious relief, *it seems*, will render a bill multifarious, if the court, at the hearing, would, upon the case made by the bill, be required to grant such relief, in addition to granting the relief which is not multifarious.

But where multifarious relief is not prayed for in the bill, it is not a matter of course to give it, at the hearing, under the general prayer; in addition to the relief in which the complainants have a common interest.

THIS was an application, on the part of the complainants, to open an order entered by the defendant to close the proofs, and to allow farther time for the complainants to take testimony in this cause. And a second application was made, for leave to amend the complainants' bill, by striking out the name of Murray as one of the complainants therein.

The defendant's solicitor, on the 10th of June, 1835, entered an order that the complainants produce witnesses in this cause within forty days after notice of the order, and served a notice of such order upon the solicitor for the complainants the same day. On the 18th of July, the solicitor for the complainants mailed an affidavit, directed to the chancellor, and obtained his fiat for an order, founded thereon, extending the time to produce

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proofs until the 1st of October. The fiat was received on Monday the 21st of July, the second day after the great fire in New-York; and the order was entered the same day, but was not served until the afternoon of the 22d, owing to the derangement of business produced by the fire. Previous to the receipt of notice of the order, the defendant's solicitor had entered an order to close the proofs; which, under the instructions of his client, he refused to open. The application for leave to amend was made upon the supposition that an objection for a misjoinder of complainants could be sustained; the bill having been filed by two persons, who were owners of different dwelling houses in severalty, having no joint interest in either of them, to restrain an alleged nuisance which was a common but not a joint injury to both of the complainants.

*E. Sandford*, for the complainants.

*A. Williams*, for the defendant.

THE CHANCELLOR. The objection that the order to produce witnesses was not entered in the proper form is not well taken. By the practice of the English court of chancery, and as it formerly existed here, either party who wished to close the proofs was obliged to enter a rule that the adverse party produce his witnesses; and at the expiration of the time allowed by that order, he entered the order nisi to pass publication. By this last order both parties were precluded from examining farther witnesses, after the expiration of the eight days, unless an order to enlarge publication had been obtained in the meantime. (2 *Dan. Ch. Pr.* 562. 1 *Smith's Ch. Pr.* 252.) The rules of this court, however, have altered the practice so far as to allow either party to enter a forty day order to produce witnesses, upon which the party entering such order, or the adverse party, may proceed and obtain an absolute order to close the proofs after the expiration of the time allowed by the first order, unless the time shall be enlarged by a special order of the court. (*Rule* 68.) But the mere authority to one party to enter an order to close the proofs,

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upon an affidavit of the receipt of a notice from the adverse party of an order to produce witnesses, did not necessarily require a variance in the form of the first order. The order to produce witnesses may therefore be in the form originally used, requiring the adverse party to produce witnesses within forty days. Or it may be in the form contained in the precedents of Barbour and of Hoffman, requiring *the parties* to produce witnesses, &c.; which is according to its legal effect, under the new rule of this court upon the subject. The order to close the proofs was therefore strictly regular; although the form of the preliminary order entered by the defendant did not in terms require the defendant himself, as well as the complainant, to produce witnesses within forty days. For, upon filing an affidavit of the receipt of notice of such an order as was entered in this case, the complainant could himself have entered an order to close the proofs, at the expiration of the specified time.

But as the complainants had actually obtained the fiat of the court, and had entered an order thereon, enlarging the time to produce witnesses, within the time allowed for that purpose by the practice of the court, the service of which order was delayed by mere accident, the order to close the proofs should be opened upon payment of costs. The excitement and confusion necessarily produced among business men in New-York by the great fire on the previous Saturday, is sufficient of itself to excuse, or account for, the delay in serving the order immediately after it was entered. The order to close the proofs must therefore be vacated, and the time to produce witnesses is extended to the first of November next, inclusive. And the complainants are to pay to the defendant's solicitor \$15 for his costs of entering the order to close the proofs, and noticing the cause for hearing, and opposing this application to open such order.

The application to amend, by leaving out the name of one of the complainants, should also be granted, upon such terms as will effectually protect the defendant as to costs, &c.; if there is in fact a misjoinder of the complainants, which may be fatal to their suit at the hearing. Upon an examination of the question, however, I am satisfied there is no misjoinder of complain

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ants, so far as the bill seeks to restrain the continuance of a nuisance which was a common though not a joint injury to both of the parties who have filed this bill. There is no inflexible rule on the subject of joinder of parties in this court. But, as a general principle, several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for the separate relief of each; nor can a single complainant, having distinct and independent claims to relief against two or more defendants severally, join both or all of them in the same bill. There are, however, many exceptions to this general principle; and the court exercises a sound discretion in determining whether there is a misjoinder of parties, under the particular circumstances of the case. Thus in the case of *Kensington v. White*, (3 *Price's Rep.* 164,) the court of exchequer in England overruled a demurrer for multifariousness, which was put in to a bill, filed by seventy-two different underwriters upon policies for the defendants, upon which policies the complainants had been sued at law for their respective subscriptions; the object of the bill being to enable each complainant to establish a defence, which was common to all. And this decision was followed by Lord Abinger in the more recent case of *Mills and others v. Campbell*, (2 *Young & Coll. Exc. Rep.* 389,) where the suits against some of the complainants were upon ordinary policies by simple contract, and against others upon a policy under seal. This court also sustained a bill filed by different judgment creditors, having a common but not a joint interest in the relief sought by their suit, in the case of *Brinckerhoff and others v. Brown and others*, (6 *John. Ch. Rep.* 139.) And it is a common practice in this court for two or more judgment creditors, having separate judgments, to join in a suit to reach the equitable interests and choses in action of their common debtor, after they have exhausted their remedies at law, by executions upon their respective judgments.

The particular question which arises in this suit, whether two or more persons having separate and distinct tenements which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance which is



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a common injury to the respective tenements of each of the complainants, may join in a suit to restrain such nuisance, does not appear to have been raised in England until recently; and then in a single case only, which was not very fully considered. In the case of *Spencer & Ward v. The London and Birmingham Railway Company*, (1 Nicoll, *Hare & Car. Railway Cases*, 159,) which came before the vice chancellor of England in 1836, the bill was filed by the landlord and his tenant, for a nuisance which was supposed to be an injury to the interests of each in the property; and an injunction was granted without raising the question of misjoinder of parties.

The same thing occurred in the case of *Sutton and others v. Montfort*, (4 *Sim. Rep.* 559,) which came before the same equity judge five years previous; where two tenants of different buildings, having no joint interest, joined with the landlord of both in filing the bill to restrain the nuisance. But in the more recent case of *Hudson and others v. Maddison*, (5 *Lond. Jur.* 1104,) which came before him in December, 1841, where five different owners of separate houses had joined in a bill to restrain a nuisance which was a common injury to all their houses, he seems to have taken it for granted that the objection of misjoinder of complainants would be fatal at the hearing; and he discharged the injunction upon that ground alone. (See 12 *Sim. Rep.* 416, *S. C.*) Even if that case may be considered as finally settling the question in England, which I presume it does not, as it does not appear to have received the sanction of the lord chancellor, upon appeal or otherwise, I do not consider myself at liberty to follow that decision here; as the question was settled by this court directly the other way, more than twenty years since.

In the case of *Reed and others v. Gifford*, (*Hopk. Rep.* 416,) which came before Chancellor Sanford in February, 1825, the complainants, as the chancellor states in his opinion, were several proprietors of different lands and mills, and of separate parts of the natural water-course at the outlet of a lake. The nuisance which they sought to restrain was an artificial channel, cut by the defendant upon his own land, the effect of which

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would be to draw off the water of the lake, and thereby to prevent it from flowing in its natural channel to the several mills of the complainants, respectively. And he decided that as the acts of the defendant, complained of, were a common injury to all the complainants, there was such a common interest in the subject of the suit as to authorize them to join in one bill; although the injury which each sustained, by the diversion of the water from his individual mill, was separate and distinct.

It is true each of the complainants, in that case, would have had the right to file a bill to restrain the nuisance, which was a special injury to his individual property. But as the relief sought was the same as to all the complainants, there certainly was no good reason for compelling them to file several bills to protect their common right against acts of the defendant, which were injurious to all of them. A similar opinion was expressed by me in the case of *The Trustees of Watertown v. Cowen*, (4 *Paige's Rep.* 510;) although from the manner in which the formal objection of the misjoinder of complainants was raised in that case, it was not necessary definitively to decide the question of misjoinder of parties. For it is well settled that a mere formal objection of that kind, which is neither raised by demurrer nor by the answer of the defendant, cannot be set up at the hearing as a bar to relief which is common to all the complainants.

In the case of *Marselis and others v. The Morris Canal Company*, (*Saxton's Rep.* 31,) where the objection was raised, that the bill was multifarious, because several persons having distinct and independent interests had joined therein as complainants, the acts of the defendants, complained of, were neither a joint nor even a *common injury* to all the complainants. There the entry upon the land of each complainant and excavating the same, for the purpose of making the canal, without compensating the owner for his property, was a distinct and independent cause of complaint. And it was in nowise injurious to his co-complainants; nor did it in any way interfere with, or affect, their several rights of property. That case therefore was rightly decided upon that ground. In the case under consideration, however, the bill shows that the erec

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tion and continuance of the alleged nuisance, and of every part of it, is a common injury to the separate property and rights of each of the complainants.

It is said the complainants in this case in addition to their prayer for a perpetual injunction to restrain the continuance of the nuisance, have also prayed for an account, and compensation for the damage which they have respectively sustained by the alleged nuisance. The insertion of such a prayer might perhaps render the bill multifarious, if the court, at the hearing, would, upon the case made by the bill, be required to grant such multifarious relief, in addition to the restraining the continuance of the nuisance, which is a common injury to both complainants. But where multifarious relief is not prayed for in the bill, it is not a matter of course to give multifarious relief at the hearing, under the general prayer, in addition to the relief in which the complainants have a common interest. That objection to this bill may therefore be obviated by striking out that part of the prayer which calls for an account of the damages which the complainants respectively have sustained by reason of the alleged nuisance.

The motion to amend by striking out the name of Murray, as one of the complainants, must be denied with \$15 costs. But the complainants are to be at liberty to amend their bill within twenty days, by striking out the prayer for an account and payment of the damages.

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LOVELAND vs. BURNHAM and others.

Although the 31st rule fixes the minimum of the penalty of a bond, to be taken by the officer allowing an injunction out of court, such officer must exercise a reasonable discretion in fixing the amount of the security to be given; so that it shall, in all cases, be sufficient to cover the probable amount of damages which the defendants may sustain by reason of such injunction.

The officer allowing an injunction should require a bond for a larger sum than

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\$500 where, from the nature of the case, there is reason to suppose the damages occasioned by the injunction, if it should continue until the termination of the suit, will exceed \$500.

The sureties in such a bond should also be required to justify in a sum of at least double the penalty of the bond.

Where an injunction is issued without the requisite security being given, the court will set aside such injunction, for irregularity, with costs.

An injunction bond must be acknowledged by the obligors therein, or must be proved by a subscribing witness to the same, or it will be invalid, and the injunction issued thereon will be irregular.

THIS was an application, on the part of the defendants, to dissolve, or modify, or set aside, the injunction which had been issued in this cause; on the ground of the insufficiency of the bond which had been taken by the injunction master, upon allowing such injunction. The object of the injunction was to restrain the defendants from selling, assigning, removing, or intermeddling with a schooner, alleged in the bill to belong to the complainant jointly with some of the defendants. The bond was in the penalty of \$500 only; which sum, as one of the defendants swore, was entirely insufficient to cover the damages and injury which they would sustain by the schooner's lying idle for six weeks, and by the loss of freight during that time. The affidavit also stated that the complainant was insolvent; and that the only surety in such bond was irresponsible, and without any means from which any judgment to the amount of such bond could be satisfied. The complainant did not attempt to justify, and the surety only justified in the sum of five hundred dollars, without stating his residence, or that he was a freeholder, or a householder. Nor was the bond acknowledged by the surety, or proved by a subscribing witness to the same, as required by the 172d rule of the court.

*H. L. Palmer*, for the complainant.

*D. D. Field*, for the defendants.

THE CHANCELLOR. Although the 31st rule fixes the minimum of the penalty of a bond, to be taken by the officer allow

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ing an injunction out of court, it was intended that such officer should exercise a reasonable discretion in fixing the amount of the security to be given ; and that it should in all cases be sufficient to cover the amount of damages the defendants might sustain, if it should eventually appear that the allegations in the bill were untrue, or that, for any other reason, the complainant was not equitably entitled to an injunction. The officer allowing an injunction should always require a bond for a larger sum than \$500 where, from the nature of the case, there is reason to suppose the damages occasioned by the injunction, if it should continue until the termination of the suit, will exceed the minimum fixed by the rule.

The sureties in such bond should also be required to justify in a sum at least double the penalty of the bond. For, under the present exemption laws, a surety may swear that he is worth five hundred dollars, over and above all debts and responsibilities, and yet may not have one half of that amount which a creditor will be able to reach by execution ; or even by a creditor's bill. The object of this rule was to afford to the party enjoined full and ample security for all damages he might sustain, by reason of the allowance of an injunction, against him, without giving him an opportunity to be heard in opposition to such allowance. And whenever the injunction is issued without the requisite security, to indemnify the defendant against such contingent damage, it will be the duty of the court to set aside the injunction, with costs ; for the irregularity in the issuing thereof without complying with the rules and practice of the court. An excuse is given in this case, by the solicitor, for omitting to state, in the affidavit of justification, that the surety was a householder ; but no excuse whatever is made for the neglect of the surety to justify in double the penalty of the bond ; as required by the practice of the court. Nor is there any excuse given for not taking the acknowledgment of the surety, to the due execution of the bond by him ; or proving its execution, by the subscribing witnesses to the same, so as to authorize the bond to be read in evidence without further proof.

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 Clark v. Willoughby.
 

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The officer allowing the injunction, therefore, should not have approved of such a bond; and the injunction founded upon the filing of that bond was irregularly issued, and must be set aside with costs.

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 CLARK, administrator, &c. vs. WILLOUGHBY.

It is irregular for a party, by new exceptions to a master's amended report, to raise the same questions which have been considered and decided by the court on the exceptions to the original report.

Where a master's report, upon the hearing of exceptions to the same, is sent back to be amended, it is not open for review generally by the master; unless the court expressly authorizes him to review it generally, or the nature and scope of the exceptions allowed necessarily embrace the whole subject matter of the account originally taken by the master.

The usual order nisi, to confirm a master's report, which is entered upon the filing of such report, becomes absolute at the expiration of eight days, except as to the matters embraced in the exceptions to the report. And the decretal order, made upon the exceptions, need not direct the report to be confirmed as to those parts thereof which are not directed to be altered or reconsidered by the master.

No exception can be taken to a master's report where the master has merely refused to disobey the directions contained in the order of reference.

A party cannot, by excepting to a master's report, which has been properly made pursuant to the instructions of the court as contained in the order of reference, indirectly review the decision of the court in giving such instructions. But if he is dissatisfied with the order of reference, he must apply for a re-hearing thereof directly, or must appeal.

THIS was an appeal from an order of the vice chancellor of the first circuit, ordering the defendant's exceptions, to the master's amended report in this case, to be taken off the files of the court. The bill in the cause was filed against the defendant Willoughby and J. B. Clark, as the administrators of the estate of J. Fisher, to recover the balance of an account claimed to be due to the estate of H. Fisher; and in 1835 a decretal order was made, by the vice chancellor of the first circuit, referring it to a master to take and state the account. The master made his report in February, 1843; and the defendants

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took twelve exceptions to that report, which were afterwards brought to a hearing before the assistant vice chancellor. J. B. Clark, one of the defendants, died; and the cause was directed to proceed against Willoughby as the surviving administrator. Before any decision had been made by the assistant vice chancellor, the surviving defendant presented a petition to the vice chancellor, stating that the defence had been conducted by his co-defendant, then deceased; and claiming that he had not received any of the funds of the estate, and that he ought not to be personally charged with the amount which might be found due to the complainant. And he thereupon obtained an order authorizing him to file a cross-bill, in the nature of a bill of review and supplement. Subsequently, and on the 4th of September, 1844, the assistant vice chancellor made his decretal order upon the exceptions; allowing the sixth and ninth exceptions, and disallowing all the rest, except so much thereof as related to the admissibility of the testimony of R. Bogardus, and to the mode adopted by the master in the computation of interest. The decretal order further directed that the report should be referred back to the master, to be altered and corrected as follows: "That the master, in stating the account under this decree, do strike a balance upon each and every sale, stated in the report and in schedule C. thereto annexed, on the first of January, 1822, and that he *charge interest*, from the time of the respective sales, upon one-third of the purchase money in the said report and schedule mentioned, as the said one-third is set forth in the schedule, and that he credit interest upon the respective payments made by J. Fisher to H. Fisher, on account thereof, down to the first of January, 1822, in the same manner which John Fisher had adopted in the small books, and from the dates therein computed; that the master allow commissions at the rate allowed in his original report; that he allow interest upon the balance, as thus ascertained, from the said first of January down to the date of his report; and that he also allow interest on payments made subsequent to the said first of January, from the time of such payments, as in schedule E. annexed to the original report."

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Immediately after the decision and decretal order of the assistant vice chancellor, the defendant filed a cross-bill, in the nature of a bill of review and supplement; and claiming, among other things, to review this decision of the assistant vice chancellor upon the exceptions. But the vice chancellor afterwards directed that part of the cross-bill to be expunged; so as to confine the litigation, on that bill, to the question of the personal liability of Willoughby, for the balance which might be found due, upon the confirmation of the master's report.

In March, 1845, the master filed his amended report, in conformity to the directions of the decretal order upon the exceptions; whereupon the defendant filed two exceptions to the report, raising the same questions which had been decided against him by the assistant vice chancellor upon the hearing of the exceptions to the original report. The vice chancellor directed these exceptions to the amended report to be taken off the files. And from that order the defendant appealed to the chancellor.

*E. Sandford*, for the appellant.

*E. H. Owen*, for the respondent.

THE CHANCELLOR. It was clearly irregular to attempt to raise the same questions, by new exceptions to the master's amended report, which had been considered and decided by the court upon the exceptions to the original report. Where a report is sent back to be amended, upon the hearing of exceptions taken to the same, it is not open for review generally by the master; unless the court expressly authorizes him to review it generally, or the nature and scope of the exceptions allowed necessarily embrace the whole subject matter of the account originally taken by the master. The usual order nisi, to confirm, which is entered upon the filing of the original report, becomes absolute at the expiration of eight days, except as to the matters embraced in the exceptions. The decretal order made



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upon the exceptions, therefore, need not direct the report to be confirmed as to those parts thereof which are not directed to be altered or reconsidered by the master. The master was bound, in this case, to charge the defendant with the amount embraced in the first exception to the amended report; or rather he was not at liberty to alter the original report in that respect. And the disallowance of interest, as claimed by the second exception, would have been directly in the face of the decretal order, upon the exceptions; which order directed it to be allowed by the master. No exceptions can be taken to a report because the master has refused to disobey the directions contained in the order of reference, under which he is directed to act. A party cannot, therefore, by excepting to a report which has been properly made, pursuant to the instructions of the court, as contained in the order of reference, indirectly review the decision of the court in giving such instructions. If he is dissatisfied with the order, he must either apply for a re-hearing directly; or he must appeal from the decision, to the proper appellate tribunal, within the time allowed by law for appealing. (*See Brown v. De Tastet, Jac. Rep. 293; East India Comp. v. Keighley, 4 Mad. Rep. 17.*)

I think the vice chancellor was also right in directing the exceptions to be taken off the files; instead of subjecting the complainant to the expense and delay of setting them down for argument, and having them overruled at the hearing. The usual course, upon an original report, unquestionably is to argue the exceptions to the same; even where the adverse party insists that the part of the report excepted to is in compliance with the express directions of the court, as contained in the decree or order of reference under which the report was made. But it is certainly irregular for a party to put in the same exception to an amended report which has already been overruled as an exception to the original report. For the part of the amended report thus excepted to has already been confirmed, by the disallowance of the exception to the original report. The exceptions to a report only operate as an enlargement of the order nisi to confirm the report; and the disallowance of the excep-

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Wilkes v. Wilkes.

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tions has the effect of a confirmation of the part of the report embraced in such exceptions. (2 *Smith's Chan. Pr.* 346. 2 *Dan. Chan. Pr.* 959.)

The order appealed from must be affirmed, with costs.

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## STEVENSON vs. GREGORY and others.

The remedy, for a neglect of the master to execute a part of the order of reference, is not by excepting to his report, but by a motion to refer the report back to the master, to amend it in that respect.

EXCEPTIONS to a master's report.

*P. Gansevoort*, for complainant.

*J. Rhoades & W. W. Frothingham*, for defendants.

The CHANCELLOR decided, that a master's report could not be excepted to merely because the master had omitted to report as to some matters which he was directed by the order of reference to report upon. The remedy of the party, in such a case, is to move that the report be referred back to the master; with instructions to him to correct the report, so as to make it embrace the whole matters of the reference.

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## WILKES vs. WILKES and others.

Where the register is appointed guardian ad litem, in a partition suit, the trust, upon his resignation of his office of register, devolves upon his successor in office; and notices and other papers in the cause must be served upon the latter.

A MOTION was made, founded upon a service on the former assistant register, as guardian ad litem of some of the defendants, in a partition cause, who were infants.

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Underhill v. Jackson.

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*H. H. Martin*, for complainant.

The CHANCELLOR decided, that the service of a notice upon the former assistant register, as guardian ad litem, after he had resigned and a new assistant register had been appointed, was not sufficient; for the assistant register having been appointed guardian ad litem, by virtue of his office, upon his resignation, the statute constituted his successor in the office guardian ad litem, in his place. The chancellor therefore held that services in cases thus situated should be made upon the new assistant register.

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ANONYMOUS.

Upon a hearing on bill and answer, documentary evidence cannot be read to show facts not stated in the pleadings.

The CHANCELLOR decided that on a hearing upon bill and answer, a party cannot read documents to show any other facts than those which are stated in the pleadings.

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UNDERHILL, committee, &c. vs. JACKSON and others.

A report of commissioners in partition must be signed by all the commissioners. Or, if not so signed, it should state the reason of the omission.

It should also state that all the commissioners met together and consulted, &c. where a sufficient reason is given for its not being signed by all.

Where a share of premises partitioned is set off to a lunatic, or to an habitual drunkard, the title is vested in him, and not in his committee.

THIS was a partition suit, and was heard on the report of the commissioners who had been appointed to make partition. The report was signed by only a part of the commissioners; and no

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Banks v. Walker.

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reason was given for the omission of the others to join in signing and acknowledging it. Nor did it appear from the report that all the commissioners met together and consulted upon the matter of the partition.

*J. Rhoades*, for complainant.

The CHANCELLOR decided, that the report should be signed by all the commissioners; or if not signed and acknowledged by all, it should state the reasons for the omission. And that it ought to appear from such report that all the commissioners met together and consulted upon the matter of the partition; where a sufficient reason is given for the report being signed by a part only. He also decided that where a share of premises partitioned is set off to a lunatic, or to an habitual drunkard, who has a committee appointed by this court, the title is vested in the lunatic, or drunkard, and not in his committee. (*See 2 R. S. 246, § 28, 29, 31, 32.*)

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BANKS and others vs. WALKER and others.

The affidavit of merits, in a mortgage case, under the 91st rule, need not be made by the defendant himself. It is sufficient if it be made by his solicitor.

THIS was a mortgage case of the fourth class.

*W. S. Sears*, for the complainants, claimed that it was entitled to a preference over other causes of the same class, on the ground that there had been no valid affidavit of merits filed, as required by the 91st rule. An affidavit had been filed; but it was not made by the defendant himself, but by his solicitor.

*J. R. Whiting*, for the defendant, insisted that it was not necessary the affidavit should be made by the defendant; but

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The Bank of Utica v. Finch.

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that it was sufficient if made by his solicitor, who frequently knew more about the facts than the party himself.

THE CHANCELLOR decided that the affidavit was sufficient, to prevent the cause from being taken up out of its order upon the calendar.

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## THE BANK OF UTICA vs. FINCH and others.

Rights of a purchaser from a defendant in a foreclosure suit, who purchases after decree *pro confesso*.

Effect of amending bill after the original bill is taken as confessed.

*John Ganson*, for the complainants.

*A. Taber & M. T. Reynolds*, for the defendants.

THE CHANCELLOR decided that a person who purchases property from a defendant in a foreclosure suit, after the bill has been taken as confessed against him, takes such property subject to all the rights of the complainant; and is bound by the admission made by such defendant in suffering the bill to be taken as confessed against him. That where an original bill is taken as confessed, and an amended bill is subsequently filed, making other persons parties, the order *pro confesso* is thereby opened.

**BARNARD and others vs. DARLING.**

[Reviewed, 56 Cal. 596.]

**The pendency of a motion for leave to amend the bill is no objection to a motion for a receiver ; provided the defect in the bill is not fatal, or does not render the bill demurrable.**

**The pendency of a motion to dissolve an injunction is no objection to the appointment of a receiver.**

**Where a motion is pending in the supreme court to set aside the judgment on which a creditor's bill is founded, this court will direct a motion for a receiver to stand over until the motion to set aside the judgment can be made and decided**

**THIS was a motion for the appointment of a receiver in a creditor's suit.**

*Allen & Hastings*, for the complainants.

*C. P. Collier*, for the defendant, resisted the application, on the grounds that motions were pending before the chancellor for leave to amend the bill, and to dissolve the injunction ; and that a motion to set aside the judgment on which the bill was founded was pending in the supreme court.

The CHANCELLOR decided that it was no objection to the motion to appoint a receiver that a motion for leave to amend the bill was pending ; unless the defect in the bill, which was sought to be remedied by amendment, was fatal, or was such as to render the bill demurrable. The chancellor also held that it was no objection to such an application, that notice of a motion to dissolve the injunction had been given. But he directed the motion for a receiver to stand over, until the defendant could have an opportunity to make his motion, in the supreme court, to set aside the judgment, and have it decided.

## COOLEDGE vs. COOLEDGE.

A decree of divorce in an adultery case may reserve to the wife, who is the complainant, the right to go before a master and get his report as to a proper allowance to her for alimony.

THIS was a motion for a decree of divorce in an adultery case. No report of a master having been obtained as to the amount of alimony proper to be allowed to the wife, who was the complainant ;

*A. C. Hand*, for the complainant, asked the direction of the court on the subject.

The CHANCELLOR said that the decree might reserve to the complainant the right to go before a master and get his report as to a proper allowance to her for alimony ; and that the decree might direct the payment, of the amount which should be reported by the master, upon the coming in and confirmation of his report.

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## BURTIS vs. DODGE.

Where an executor, about a year after the granting of letters testamentary, tendered to one of the residuary legatees so much of his share of the residuary estate as the executor was able to distribute at that time ; which such legatee refused to receive until he should be paid the whole amount of his share ; *Held*, that the legatee was not entitled to interest on the sum thus tendered.

Where a residuary legatee is informed of the fact that a final dividend has been made, by the executor, to the several residuary legatees, and that the executor is ready to distribute the amount among them, and where such legatee is an adult, and competent to attend to his rights, it is not the duty of the executor to go to him and tender the amount of his distributive share ; especially where the legatee has previously refused to receive a portion of his share, when it was tendered to him.

Where an executor is liable to be called upon at any time, by a legatee, for the

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amount of his legacy, so that such executor cannot safely invest the money, he will not be required to pay interest thereon; in the absence of any proof that he has mingled the trust fund with his own moneys, or that he has used it in any way so as to make it produce interest.

Where no time is fixed in a will for the payment of a legacy, it is payable at the expiration of one year from the time of the testator's death, and will not commence drawing interest until that time.

An executor is not entitled to charge the estate with a counsel fee, paid by him upon the final settlement of his account before the surrogate; or for drawing up his accounts in a proper and legal form on such final settlement.

A surrogate is not authorized to make an arbitrary allowance to an executor, in lieu of the compensation directed by the statute to be paid to advocates and proctors in surrogate's courts; where the same is to be paid as costs in the suit, either by the adverse party, or out of the fund in litigation.

An executor is not entitled to commissions on the share of a legatee, which share the will directs to be deducted from the valuation of a farm, specifically devised to the legatee, upon his paying to the executors the residue of the appraised value of such farm.

THIS was an appeal by one of the six residuary legatees of J. Burtis, deceased, from the sentence or decree of a surrogate, upon the final settlement of the account of the acting executor. The principal ground of complaint, stated in the petition of appeal, was that the executor had not been charged with interest upon the balance in his hands, belonging to the appellant. But the appellant also assigned for error, in the items of the account, that the surrogate had allowed the executor \$22,50 paid to the daughter-in-law of the testator, which was an over payment beyond the amount of her legacy; and also that he had erroneously allowed the charge of \$50 which, in the account presented to the surrogate, the executor had charged as a fee to his counsel upon the final settlement. In that account the executor had also charged the further sum of \$50 for anticipated expenses; and \$30 for commissions on the share of one of the legatees, which by the directions in the will was to be deducted from the valuation of a farm; which farm was specifically devised to her, upon payment to the executors of the residue of the appraised value. These two charges the surrogate decided to be erroneous. But instead of adding one-sixth of each charge, to the balance due to the appellant as stated in



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the account of the executor, he added thereto the whole \$80. And the respondent in his answer to the petition of appeal, specified the error in these two items, against him, as he was authorized to do by the 118th rule of this court; in the nature of a cross appeal.

*H. G. Onderdonk*, for appellant. 1. The charge for \$50 counsel fees was erroneously allowed to the executor. It is settled by the case of *Halsey v. Van Amringe*, (6 *Paige's Rep.* 12,) that there can be no arbitrary allowance made for counsel fees; but that the solicitor and counsel are entitled to their taxable fees, and no more. In the present instance, the charge for counsel fees is not made for services rendered, or advice given, to the executor during the continuance of his trust, but it was paid for drawing off the accounts in a legal form, and for services on attendance before the surrogate on the final settlement. Under that decision the charge was incorrect. 2. The charge of \$22,50 paid by the executor to Sarah Burtis, was also erroneously allowed. The only reason given by the executor, and which was sanctioned by the surrogate, is that the testator had been in the habit of paying her that sum annually, and he, the executor, considered it due to her. There is no evidence of the fact, except the executor's statement. Even were it proved, it is still but a habit. There was no obligation upon the testator so to do. It was a mere act of kindness or generosity on his part, and no legal liability to pay devolved upon the testator merely from a repetition of it. If there was no legal obligation on the part of the testator, there certainly was none on the part of the executor. He had no right to make charitable contributions, and then charge them to the estate, because the testator had been in the habit of so doing. Moreover, the very fact of the legacy being left to Sarah Burtis, shews that the testator intended it in lieu of the annual payment; and contemplated the inability of the executor to continue it after his death. He bequeaths a sum in gross, instead of an annual payment. There exists the same propriety for the payment of this sum every year, as for making it a single time. It was not a debt or

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claim upon the estate; and the allowance of it to the executor was therefore erroneous. 3. The appellant is entitled to interest upon his share, as residuary legatee. It is admitted that \$468,36 was due and payable to him, as residuary legatee, on the fourth of May, 1833; and he claims interest on that sum from that day. The rule of law in regard to the allowance of interest against executors and trustees, is too well settled in favor of legatees and cestuis que trust, to need much argument. The rule is clearly established, that interest is chargeable on the annual balances in an executor's account; unless such balances are necessarily kept in his hands for the purposes of the estate. (*Darrell v. Eden*, 3 *Dessau. Rep.* 241. 4 *id.* 369, 463 and 555. 4 *Bibb*, 266.) The same rule should be adopted in a case of a balance on a final settlement; inasmuch as charging interest on annual balances, is laying down a much more strict rule, and treating the executor with much more severity. In another case it was held that an executor who does not render an account, although he swears that he has not used the fund, nor loaned it to others, but has kept it on hand, is chargeable with interest from the day of the receipt of the trust money. (*Arnold v. Luney*, 1 *Dev. Eq.* 369.) In *Gray v. Thomson*, (1 *John. Ch. Rep.* 84,) the trustee was charged with interest from the day the property was converted into cash. This, say the court, is the rule laid down in relation to negligent trustees. If executors retain money in their hands without good reason for so doing, they will be charged with the interest which they might have made thereon. (*Stephens v. Van Buren*, 1 *Paige*, 480. See also *Kellett v. Rathbun*, 4 *id.* 110.) Executors have also been held chargeable with interest where they have neglected to invest. (*Schieffelin v. Stewart*, 1 *John. Ch. R.* 620.) The rule on this subject is, that where an executor retains money in his hands, which by investing he might make productive, he is chargeable with interest. If he use the funds, or neglect to pay them over, or if he do not invest so as to make them productive, he is chargeable with interest. (11 *Vesey*, 58, cited in 1 *John. Ch. R.* 510.) And if he finds difficulty in investing, it is his duty to apply to the court for instructions. (See also *Stork v*

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*Stork*, 1 *Dessau*. 193 and 219.) These cases show the rigor with which trustees and executors are treated. They are charged with interest where they might have invested, and where they have unnecessarily kept funds on hand idle. Whenever the income or annual product of the estate is sufficient to defray the necessary expenditures and keep down the incumbrances, it is their duty to keep the surplus invested. If there be no necessity, as in the present case, to keep it on hand for future contingent expenses, it is their duty to pay over that surplus, and distribute it among the parties entitled.

The courts have in numerous instances inferred the breach of trust, from the lapse of time. In the case of *Turner v. Williams*, (7 *Yerger*, 172,) the court lay down the following broad rules, which are applicable to the present case in all its aspects. "Where an executor receives interest; where he uses the money of the estate for his own purposes; where he keeps the money by him without a reasonable ground for doing so; where by long delay in settling his account, the use of the money may be inferred, in all such cases interest will be charged, with a view to reach the profits, which, from the facts, will be inferred and presumed to have been made. So in 1 *John. Ch. R.* 510, the court inferred from the lapse of time, that the trustee had mixed the money with his own, and charged him with interest. In Maryland, the courts have laid down an equally broad rule. Where an executor negligently leaves the estate unsettled, and then suffers the accounts to remain uncollected, &c. he is justly chargeable with interest. (*Lyles v. Halton*, 6 *Gill & John*. 122.) The equity courts of South Carolina, whose decisions always have been treated by our own judiciary with great respect, have added the weight of their opinions to the already established rule. In *Jenkins v. Fickley*, (4 *Dessau*. 369,) the court says, executors having balances in their hands for several years are chargeable with interest." In *Gray v. Tompkins*, (1 *John. Ch. R.* 84,) the chancellor said, "from length of time, the presumption is that the executor appropriated the funds to his own use." If, therefore, lapse of time in settling accounts, or unnecessary detention of funds without paying or investing, are *prima facie*

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evidence of neglect and fraud, and presumed a breach of trust, it is the duty of the executor to destroy and rebut that inference. It is not incumbent on us to prove that he has not retained the money separate from his own, or that he has not been ready to pay it, nor in fact to prove the negligence. But it is his duty to prove where the money was, and that he was ready to pay it. In *Ratcliff v. Green*, (1 *Vernon*, 196,) the court ruled that it was the duty of the executor to prove that he had kept the money separate. (See also *Dunscumb v. Dunscumb*, 1 *John. Ch. R.* 510.) There is no evidence to prove that a tender of the \$250 was ever made. But even admitting that this sum was tendered before the whole share was due, the executor is bound to tender and pay over the whole when it is all due, or show some good legal excuse for not so doing. A tender is no excuse. It was the duty of the defendant to pay over the money. In 1 *John. Ch. R.* 510, the court held that being ready, was no excuse for the executor. If an executor would avoid being charged with interest he may either 1. Pay over the money, (not offer or tender it;) 2. Invest it, until he chooses to settle his account finally; or 3. He may have his account finally settled, and his trust closed and discharged. At any time after eighteen months from the granting of letters testamentary he has the privilege of rendering a full and final account. In this case, the eighteen months had elapsed before the fourth of May, 1833. At that time, therefore, when he admits that he had this amount due us ready to be paid, it was his duty to bring his account before the surrogate. If, however, a tender in a case of this kind is a good defence to the claim for interest, we insist that the tender was not good and perfect. A tender should be open, clear; and above all, a manual tender. There must be an actual offer to pay, and an actual production of the money. A sum also must be specified, even if a tender be refused because more is due. Such refusal does not dispense with the actual production of the amount admitted to be due. (6 *Wend.* 22.) It is unsafe to dispense with the actual production, by the hands of the tenderor. (15 *Wend.* 637.) Here the evidence shows that no money was produced. Moreover, a tender must be kept good, by showing

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that the money has always been ready to be paid over. No pretence is made in this cause that this has been done. 3. As to the rate of interest which should be allowed to the appellant. It is well established that when the estate has been used, or mixed with the funds of the executor or trustee, compound interest is chargeable. The lapse of twelve years justifies the legal presumption that the executor has applied the funds to his own use. If he wishes to restrict himself to the actual profits he has made, he can do so by disclosing those profits. (1 *John. Ch.* 134.) Not having done so, he must be accountable for the greatest amount which a careful and cautious man would have made. The appellant is entitled to interest on \$468,36 from May 4th, 1833, and to interest on \$250 of that sum from the fourteenth of July, 1832, when the other legatees were paid off, until May 4th, 1833, when the whole sum was due to him; and annual rests should be made in the whole computation, so as to give him compound interest.

*W. K. Thorne*, for respondent. 1. As to the allowance of the counsel fee of \$50: For his own protection, and for the convenience of the court, the executor was justified in engaging professional aid to complete his accounts. 2. As regards the payment to Ann Burtis, it is but a minor point in this controversy, and involving no important question. The executor conscientiously considered that he was carrying out the wishes of the testator in paying what the testator had always paid; and there was a moral obligation, which to an honorable man is as imperative as a legal one. 3. As to the question of interest. The \$250 was offered to the legatee when his brothers and sisters received their share; and if so, and the executor has never since that time been called on for it, the presumption is that the legatee left it in his hands to be called for without notice, when he needed it, and if so, the executor should not be charged with interest. He could not invest it, lest a demand should be made the next day. An executor is not chargeable with interest on all sums received by him and not applied to the purposes of the estate; provided he has reasons which rendered it

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proper to retain them in his hands. (*McCaw v. Blewit*, 1 *Bailey's Eq. Rep.* 98.) To charge him with interest is virtually charging him with imaginary values; which is manifestly absurd, and contrary to equity; and it cannot be done unless it is shown that he was grossly negligent and wilfully in fault. (14 *John. Rep.* 526.) This court, in *Jacot, adm'r &c. v. Emmett, adm'r &c.* (a) held that where an administrator mixes the money belonging to the estate of his intestate with his own, and uses it so that he has it not on hand when he is called on for payment, he may be charged with interest. But that a mere neglect by an administrator to invest money which he may be called upon to pay over to the distributees at any time, will not subject him to the payment of interest, if the money was kept ready to be paid over when called for. That case seems conclusive as to the question of interest; for it appears that the executor here has always been ready to pay the legatee his legacy. If it could not have been collected, or even if he had ever demanded it, there would then be some show of neglect, and some reason for inflicting the punishment on the executor in the payment of the interest. (See also 2 *Dallas*, 183.) The cases referred to in 1 *John. Ch. Rep.* 84, 510, 620, are none of them like this. In those cases it appeared that the executor had made use of the money and mixed it with his own funds, but particularly had made no effort to get rid of the money by offering payment to the persons entitled to receive it. In those cases where an executor is making use of money, it is but just that he should not make a profit out of the estate; but here the executor took great pains to rid himself of the money; and there is no pretence of his using it for his own benefit. At all events there is no proof. In the cases in *Ram on Assets*, 512, the court only make an executor pay interest when he was directed by the will to invest money, and instead of so doing, he keeps it himself. Indeed, all the cases are decided on the principle that an executor must pay interest when he has not done his duty, or has violated his trust, either by not investing

(a) In Chancery, Aug. 6, 1844.

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as directed, or by mixing and using the money as his own, so as not to be able to pay when called on. It would be unjust, in this case, to compel the payment of interest for money kept on hand for the express purpose of paying this legatee, for a length of time that in any case, not a trust, would bar the appellant's right to recover at all. A legacy payable at a certain time will, notwithstanding, only carry interest from the time it is demanded. (*Joliffe v. Crew*, *Prec. in Chan.* 11. *Knapp v. Powell*, *Idem.* 1 *Ves.* 310. 2 *Id.* 563. 2 *Freem. Rep.* 1.) The cases cited by appellant's counsel to show that from the length of time, the use of the money by the executor was to be inferred, and that consequently he was chargeable with interest, are none of them applicable in the present instance. The money in those cases seems to have been retained for no visible substantial purpose whatever. Neither is the case of *Lyles v. Halton*, (6 *Gill & John.* 122,) at all applicable. There the executor negligently left the estate unsettled, and then suffered the account to remain unpaid; neither of which acts is the respondent guilty of. He settled the estate, paid all the legatees, and would long since have closed up the business but for the refusal of the appellant to receive the \$250. In the case of *Stephen v. Van Beuren*, (1 *Paige*, 480,) it was decided that if an executor retains the money of infants for several years, without good reason for so doing, he will be charged with the interest which he might have received thereon. In that case there was a direct application for payment on the part of the guardian of the children, and a positive refusal on the part of the executor to pay. In the case before the court, there was neither a demand nor refusal; but on the contrary, an offer of payment was made by the executor, which offer was met on the part of the legatee by a contemptuous refusal. As the appellant had a right to call on the executor, any day, for the money, or to sue him forthwith, the executor was obliged to keep it ready for him on demand; and thus was unable to make any investment.

*H. G. Onderdonk*, in reply. The case of *Halsey v. Van Amringe*, (6 *Paige*, 12,) disposes of the question of counsel fees.

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Even if the \$50 was allowed for services rendered, and advice given to the executor, in the exercise of his duties, as well as on the rendering his account, this would not alter the case. Such was not the fact, however, as appears from the testimony of the executor. Even admitting that the \$250 was tendered, it does not vary the case. It is not pretended that the whole sum of \$468,36 was ever offered. The argument of the respondent's counsel affects only the sum of \$250; and he treats the case as if that \$250 was the whole amount involved in controversy.

The case of *Jacot v. Emmet*, cited by the respondent, is far from deciding the case in his favor. One part of the decision is by no means a new doctrine, viz. that where an executor uses trust money and mixes it with his own, so that he has it not when called for, he is then chargeable with interest. The correctness of that doctrine is admitted, and we ask the court to apply the rule in the present instance. That case also decided "that a mere neglect to invest money which the executor may be called on to pay over at any moment, will not subject the executor to interest, if the money was kept ready to be paid over when called for." The decision is confined to the case where an executor is liable to be called on for payment at any moment. Where a party is in daily expectation of being compelled to pay, it would be unreasonable to exact from him that he should always have the money ready to be paid, and that he should at the same time keep it invested. The respondent's counsel rests his defence entirely on this ground. But the facts of this case show a different state of things. He admits that he had funds in his hands on the 4th May, 1833, and that he was at that time in duty bound to pay them over. This is the ground on which we ask interest. The appellant is a residuary legatee. He has no claim for payment until all the debts, legacies and charges of every kind are paid off and discharged. A legacy, other than a residuary legacy, may be required after one year from the issuing of letters, but the payment of a residuary legacy cannot be enforced until the whole estate is closed; for until that time the account or share cannot be determined. Therefore, though an executor is legally bound to pay, when he has discharged all



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other claims, still the residuary legatee cannot know when that period has arrived. Though the executor may be legally liable to be called on for payment as soon as it is his duty to pay off the legacy, still he may, and in this case has entirely placed it out of the power of the legatee to call ; by keeping him in ignorance of his movements, and of the condition of the estate. Undoubtedly we have a right to cite him to an account ; but how could we know when to cite him ? We could not tell when he had collected all the demands due the estate, and paid all the demands against it ; and until then the amount of our share of the residue could not be ascertained ; but the statute nowhere gives the legatee a right to demand a final settlement. Although in this case the event has proved that we had a legal right to call on the executor for payment as long ago as May, 1833, still we had no means of learning, and did not learn that fact until the final settlement ; which after the lapse of twelve years, he chose to cite us to attend. We contend that it was his duty in May, 1833, to let us know that the money was in his hands, ready to be paid over.

The doctrine contended for by the respondent's counsel, that because he should have paid the money twelve years ago, and because we have suffered him to use it that length of time, he should now be exempted from interest, strikes us as being extremely absurd. Again ; though the doctrine laid down by his Honor in *Jacot v. Emmet* might be just and equitable, where the length of time was trifling, we insist that the extraordinary lapse of twelve years entirely varies the case. What may be naturally and reasonably presumed where only a few months had elapsed, would become unreasonable and forced, in a case where twelve years had elapsed. We look upon the lapse of time as one of the most suspicious features in this case. But there was another and most important point in the above decision, which we will now consider. It was added to the rule above laid down by his Honor in the case of *Jacot v. Emmet*, as an indispensable condition to the exemption of the executor from interest, that he should have held the money ready in his hands to be paid over. The counsel says that we require him

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to keep it invested, and at the same time to have it ready to pay over when called for. We have not made, and do not make, any such unreasonable request. He says if we had a right to call on him for payment, he was obliged to keep it ready for us. Undoubtedly; all that we ask is, that he should prove that he did one or the other; that he either kept it ready to pay us, or that it was invested. That he kept it ready was not proved, and that it was invested is not pretended. Though the principle of the case of *Jacot v. Emmet* is just and equitable, still the respondent does not bring himself within its terms. If he had shown that he had been liable to be called on for payment at any time, and that he had kept the money ready, the case had been different. But in the absence of any proof that he did keep the money ready, and with the positive testimony that neither he nor any other person ever notified us that he had the funds ready to be distributed, he can make no claim to the application of the rule laid down in that case. He relies entirely on that decision, and if he fails to bring himself within its terms, his defence fails.

We are entitled to interest at seven per cent. on our admitted demand (\$468,36) from May 4, 1833, at least; on which day, as is now discovered, the executor had that amount of our money in his hands; and since which time he has never notified us of his readiness to pay it over, nor tendered that or any other amount to us, nor cited us to attend any surrogate or other officer to settle upon and fix the amount of this residue due us. And we further insist, that the interest thereon should be calculated by annual rests, so as to give us compound interest; and that we are entitled to a decree reversing the decree of the surrogate, so far as it omits to allow us interest on the \$468,36, and so far as it allows to the respondent the \$50 paid to counsel, and the \$22,50 paid by the executor to Sarah Burtis without authority.

THE CHANCELLOR. I think the surrogate was right in supposing that the acting executor ought not to be charged with interest, on the amount due to the appellant as one of the residuary legatees. The whole of the estate which came to the hands

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of the acting executor, including the \$3000 which one of the daughters received in the farm at a valuation, was something more than \$18,000; of which each residuary legatee was entitled to receive less than \$500, after the whole estate should have been collected and converted into money so as to be properly distributable among them. Within about one year after the granting of letters testamentary, the acting executor had so far succeeded, in executing his trust, as to be able to make a distribution of \$250 of the residuary estate to each legatee. He thereupon paid that amount to each of the other legatees, and tendered the same amount to the appellant; who for some reason, which he does not explain, refused to receive it, until the whole residue should be ascertained and paid. This offer to pay more than half of the appellant's residuary share was immediately after the expiration of the year, during which the executor was forbidden by law to pay even the general legacies. (2 R. S. 90, § 43.) And it was about six months previous to the time when the appellant was authorized to ask for an account and distribution of the residuary estate. The appellant therefore had no ground for declining to receive this part of his distributive share because the executor did not then render a final account and pay him in full. About ten months after this offer was made, the acting executor had succeeded in getting in the whole estate; and he then made a statement of his accounts, and paid the balances due to the other five residuary legatees, in full. He was also prepared to pay off the whole residuary share of the appellant, and repeatedly sent word to him to that effect, by his brother; who was also an executor to whom letters testamentary were granted. To be sure, that brother does not recollect that he gave that information to the appellant. But if either executor was bound to go to the appellant and give him this information, he should have communicated the message to his brother; or he should have informed the acting executor that he had not done so, and that the appellant was ignorant of the fact that a final dividend had been made to the residuary legatees.

I do not, however, believe that the appellant was ignorant of

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that fact; as the parties all appear to have lived in the same neighborhood. And as the legatee was an adult, and perfectly competent to attend to his own rights, I do not think it was the duty of the acting executor to go to him and make a formal tender of the money; especially after what had occurred in relation to the \$250. If the distributive share had belonged to an infant, who was ignorant of his rights, or incompetent to attend to them, there might be some reason for charging the executor with interest, upon money which he had kept in his hands for a great length of time without investment; and without applying to the proper tribunal for directions in relation to the fund. But, in this case, the executor had no right to invest the residuary share of the appellant, who was at hand and might call upon him for payment of it at any moment. And if he had so invested it, the investment would have been at the risk of the executor; who might have been compelled to pay the money immediately, even if it had been invested in the best of securities. None of the cases cited, where executors have been charged with interest for neglecting to invest moneys, or for keeping them on hand, contrary to their duties as faithful trustees of the fund, are therefore applicable to this case. Nor is there a particle of proof here to induce a belief that the executor had mingled the trust fund with his own moneys, or used it in any way, so as to make it produce any interest. And when the appellant examined him on oath before the surrogate, and might have compelled him to disclose the fact if it was so, he objected to any answer from the executor to show that the fact was otherwise. There is no doubt, therefore, that if this residuary legatee had gone to the acting executor, at any time after the 4th of May, 1833, and asked for his distributive share of his father's estate, or had sent to him by any other person, authorized to receive it, he could have had his money at once. And if he had done so, and had even insisted upon his one sixth of the small amount claimed as an over payment to his sister-in-law, the executor would probably have paid that also; and the whole expense of the final accounting before the surrogate would have been avoided.

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In relation to that item, the executor unquestionably acted in good faith, believing it was proper for him to pay it; as the testator had been in the habit of making the widow of his deceased son a periodical allowance of that amount. But the payment was in fact unauthorized; as the legacy given by the will was all she was entitled to receive, as a bounty merely, after the testator's death. And as no time was fixed by the will for the payment of her legacy, it could not draw interest until the expiration of one year; when it was legally due, under the provision of the revised statutes before referred to.

Neither was the executor entitled to charge the estate with a counsel fee upon the final settlement of his account before the surrogate, or for drawing up his accounts in a proper and legal form on such final settlement. The whole was a part of the proceeding for the settlement of the account of the executor. And the statute having fixed the allowances which are to be made to advocates and proctors in surrogates' courts, when they are to be paid as costs in the suit, either by the adverse party or out of the fund in litigation, the surrogate is not authorized to make an arbitrary allowance to the executor in lieu thereof. (*Laws of 1837, p. 536, § 70. Halsey v. Van Amringe, 6 Paige's Rep. 12.*) Here the surrogate had the power to award costs to the executor, to be paid out of the estate of the testator; or by Burtis personally, if he thought this final accounting had been rendered necessary by his perverseness. (*2 R. S. 223, § 10.*) He has not thought proper to do so in this case, except to the extent of his own fees; which he has awarded against Burtis personally, by deducting them from the balance found due to him upon the accounting. If it was a proper case to allow the executor for the expenses of his proctor and advocate, upon the accounting, the surrogate should have taxed their costs at the rates of allowance fixed by the act of 1837. And when so taxed he should have deducted the whole amount, or the one sixth thereof only, from the balance found due to Burtis upon the accounting; according as he should have intended to charge the costs upon Burtis personally, or on the estate of the testator generally. The one sixth of these two items, objected to in the petition of appeal,

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amounting together to the sum of \$12,08, must be added to the \$548,36, ascertained by the surrogate's decree as the distributive share of the appellant.

The surrogate, however, has made a much greater mistake in favor of the appellant. For, instead of allowing him only one sixth of the executor's over-charge for commissions, and of the \$50 contingently retained to meet further expenses, he has allowed the appellant the whole of those two items. This was unquestionably an inadvertence on the part of the surrogate; and if the appellant had been contented with the decree as it stood he would have had the benefit of it, unless the executor had thought proper to hazard the costs of an appeal for so small an amount. But the executor had the right, under the provisions of the 118th rule, to bring it before this court, by his answer to the petition of appeal. The error in relation to those two items must therefore also be corrected; although the effect of such allowance will be to reduce the amount awarded to the appellant. Deducting five sixths of these two items, which is \$66,67, from the sum decreed to the appellant by the surrogate, and adding to the balance the \$12,08, for the one sixth of the counsel fee and of the overpayment to the testator's daughter in law, leaves due to the appellant \$482,26. The decree of the surrogate must therefore be modified so as to direct the executor to pay that amount only.

And as the appellant has in effect wholly failed as to his appeal, he must pay the respondent's costs upon such appeal.

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**An allegation, in a bill, that a person died insolvent, does not imply that he died entirely destitute of property, but only that his property was not sufficient to pay all his debts, in full.**

**The proper allegation in a bill, where it is sought to excuse the complainant for not making the representatives of a deceased person parties to the suit is, that the decedent died insolvent and without leaving any assets for the payment of his debts. A complainant may sometimes avoid the necessity of making particular persons parties, by waiving all claim against them in his bill. But this cannot be done to the**

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prejudice to the rights of others, who are defendants in the suit. Thus, it cannot be done where it is necessary to take an account against the defendant; and where he has a right to have other persons, who are interested in the taking of the account, before the court, to save the necessity of a future litigation with them.

Where a complainant, in his bill, claims specific relief against the defendant, and then adds a general prayer for such further or other relief as may be proper, and the case made by his bill entitles him to the specific relief prayed for, and when no other parties are necessary to entitle him to that relief, the court, at the hearing, will not grant other or further relief, under the general prayer, if persons not before the court are necessary parties to such other or further relief; although the case made by the bill would have entitled the complainant to that relief also, if all the proper persons had been made parties.

But if the bill, in such a case, asks for a discovery as to some fact not material to the specific relief prayed for, and which discovery can only be material to a different kind of relief, to the granting of which relief other persons are necessary parties, *it seems* the defendant may demur to that part of the discovery; on the ground of a want of proper parties.

If the case made by the bill entitles the complainant to particular relief, against the defendant, and would also entitle him to further relief were the necessary parties before the court, and where the prayer of the bill specifically asks for the more extended relief, to which the complainant is not entitled in consequence of the defect of parties, the defendant may demur to the whole bill for want of parties.

THIS was an appeal from a decretal order of a vice chancellor, overruling a demurrer to the complainant's bill. The object of the suit was to obtain an account and payment of the defendant's proportion of the purchase money of a tract of land in Ohio; and also of moneys expended upon the land in making improvements; and for expenses paid and incurred in the care and management and preservation of the property, by the complainant, for the joint benefit of all the persons interested in the lands. The facts as stated in the bill were substantially as follows: In 1836, Dart the complainant, Palmer the defendant, and H. Pratt, now deceased, by an agreement between themselves, were to purchase the Ohio lands and to pay for the same, in the proportions of one half for Dart, one third for Pratt, and one sixth for Palmer; which were to be their respective interests in the lands when purchased. And for the convenience of the parties in giving titles to purchasers, upon subsequent sales thereof in small parcels, they agreed that the title should be taken in the name of the complainant, and be held by him for

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the benefit of the associates, in the proportions stated. A part of the purchase money was paid, and a deed of the lands was taken in the name of the complainant; who gave his individual notes, and a mortgage upon the premises, to secure the residue of the price of the land. The notes were subsequently paid by him, either with moneys received from his associates or from his own means. But, as the bill alleged, neither Palmer nor Pratt furnished their full share of the purchase money of the land. After the purchase, Pratt sold a part of his interest therein to O. Allen. And in December, 1836, Allen and the three original associates entered into a joint contract with Dibble & Co. to perform labor upon the land, to the amount of \$10,000, in grading, excavating and filling up streets, &c. to be paid for by the associates in monthly instalments, as the work progressed. Dibble & Co. performed the labor, or a considerable portion of it, and the complainant paid them about \$6000 on account thereof. But whether the other associates paid the contractors any thing, or whether the whole amount due to Dibble & Co. for their labor under the contract, had or had not been paid, was not stated in the bill. After the purchase, the complainant, at the request of Palmer & Pratt, took the principal charge of the lands for their joint benefit; and in the care and management and preservation of the property he incurred and paid considerable expense. And, as he alleged in his bill, he was largely in advance for his associates, who were interested with him in the land; none of them having paid their just proportions of the purchase money of the land and of the other expenses. Nor had the representatives of Pratt, who died insolvent, paid their just share thereof since his death. The bill also stated that the complainant had called upon the defendant to account with him, and to pay what might be found due to him from the defendant, for the proportion of the latter of such purchase money and expenses; and that the defendant had frequently promised to do so, upon receiving a deed of his share of the land; that in April, 1844, the complainant tendered him a good and sufficient deed of one sixth of the land, but the defendant refused to come to an account, and to pay what was due from him on account of such purchase money and expenses.



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The complainant therefore prayed that an account might be taken between him and the defendant in relation to the matters of the bill, and for general relief.

The following opinion was delivered by the vice chancellor.

WHITTLESY, V. C. There is no doubt about any of the grounds of demurrer except the 6th ; which is that Allen and the representatives of Pratt should be made parties. The bill is not multifarious. No proof of the agreement is necessary. The bill does not state whether the agreement was in writing ; and it will be presumed to be in writing if a writing is necessary to its validity. Our statute of uses and trusts does not apply, as the lands are in Ohio. Chancery has concurrent jurisdiction with courts of law in matters of account. We are not able to determine from the bill whether the suit is barred by the statute of limitations or not. The demurrer is not tenable on any of these grounds ; and I am inclined to think that the objection for want of parties cannot be sustained. There is no joint obligation on the part of the co-purchasers to pay the complainant. Each is responsible to him for his own proportion. The accounts of the others are not connected with the accounts of this defendant. The complainant, to succeed, must show that he has paid something for this defendant ; and this account is to be settled independent of the account between the defendant and the other parties.

The demurrer is therefore overruled with costs ; with leave to the defendant to answer in twenty days, or in default of his answer and payment of the costs of the demurrer, the bill to be taken as confessed.

*A Taber*, for the appellant.

*M. T. Reynolds*, for the respondent. 1. The case as presented by the bill is one entire transaction and peculiarly appropriate to the jurisdiction of this court. 2. The contract between Dart, Palmer and Pratt, as set out in the bill, defines the rights and liabilities of each of the joint purchasers, and is binding on each and every one of them. 3. The land purchased being situated

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in the state of Ohio ; the statutes of this state regulating contracts for the sale and purchase of real estate, entitled, "Of fraudulent conveyances and contracts relative to lands," "Of the nature and qualities of estates in real property and the alienation thereof," and "Of uses and trusts," have no application to the case in question. 4. If the land was situated in this state, the part performance shown by the bill would take the case out of the statute. 5. But it does not appear from the bill that the contract between the three joint purchasers was not in writing. On the contrary it must be taken as granted that the contract set out in the bill is a legal and binding contract ; and if it is assumed that the contract was not in writing, it can only be taken advantage of by plea or answer. 6. Orlando Allen and the representatives of Hiram Pratt, deceased, could not be joined with the defendant as parties in this suit ; if the complainant has a claim upon them for moneys advanced on their account, the remedy against them is separate and distinct. 7. By the contract as set out in the bill the rights of the several parties are separate and distinct, and no one party is responsible for the performance of the agreement by any other party. 8. There is no joint obligation on the part of the co-purchasers to pay the complainant. Each is responsible to him for his own proportion. 9. The bill is not multifarious. No proof of the agreement is necessary. 10. Chancery has concurrent jurisdiction with courts of law in matters of account. 11. It does not appear from the bill that the action is barred by the statute of limitations. On the contrary, the bill alleges repeated promises by the defendant to pay, when a conveyance should be made ; and that pursuant thereto a deed was made and tendered in 1844.

THE CHANCELLOR. I do not think it necessary to examine any of the objections raised by the demurrer except the one which relates to a defect of parties. For the vice chancellor is unquestionably right as to all the rest.

The representatives of Pratt may be necessary parties, notwithstanding the allegation in the bill that he died insolvent. For that does not imply that he died entirely destitute of prop-

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erty, but only that his property was not sufficient to pay all his debts, in full. The proper allegation in a bill, where it is sought to excuse the complainant for not making the representatives of a deceased person parties to the suit, is that the decedent died insolvent and without leaving any assets for the payment of his debts. (*See Siddon v. Connell*, 10 *Sim. Rep.* 58.) In relation to the claim of the complainant, for so much of the defendant's share of the purchase money of the land as remains unpaid, and for his share of the expenses incurred and paid by the complainant in the care and management and for the preservation of the property, I do not see that either Pratt's representatives or Allen are necessary parties. For, in relation to those matters, a perfect decree may be made between the present parties to this suit, without interfering in any way with the rights of Allen, or of Pratt's estate.

The only difficulty in respect to parties arises from that part of the complainant's claim which is founded upon the alleged payment of more than his share of the labor upon the Ohio lands, under the contract with Dibble & Co. There all the associates who were interested in the land became jointly liable, to the contractors, for the whole amount of labor which was to be performed. And if the whole of such labor has not been paid for, Palmer is still liable to the contractors for the deficiency; although it should exceed the amount of his sixth of the whole expenditure for labor upon the premises. And even if the contractors have been paid in full by the associates, or some of them, a decree in this cause in favor of the complainant, founded upon an accounting to which neither Allen nor the representatives of Pratt were parties, would not protect the defendant from further liability to them; should either of them institute a new suit against him, claiming that Pratt or Allen had paid to the contractors more than their respective shares, for the labor. I see nothing to take this part of the complainant's claim out of the general rule that where several persons are interested in the taking of an account, they should all be made parties, either as complainants or defendants. I think it is therefore a valid objection, to so much of the discovery and relief, sought by the complainant's

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bill, as relates to the expenditures for the labor performed by Dibble & Co. upon the premises, that Allen and the representatives of Pratt are not made parties. The complainant may sometimes avoid the necessity of making particular persons parties, by waiving all claim against them in his bill. But this cannot be done to the prejudice of the rights of others who are made defendants in the suit. It cannot therefore be done where it is necessary to take an account against the defendant; and where he has a right to have other persons, interested in the taking of the account, brought before the court, to save the necessity of a future litigation with them. (*Welf. Eq. Pl.* 80; *Story's Eq. Pl.* § 137, 138.)

The only remaining question to be considered is whether the objection for want of parties in this case authorized a demurrer to the whole bill. Some doubt appears to have existed, in England, whether the want of proper parties as to a part of the relief to which the plaintiff would be entitled if all the necessary parties were before the court, would authorize a demurrer to the whole bill. In the case of *The East India Co. v. Coles and others*, (3 *Swan. Rep.* 143, *n.*) the demurrer was to the whole bill; and it was admitted that as to some parts of the bill a demurrer would hold, for want of parties. But the counsel for the complainant insisted that a decree might be made as to part of the matters in controversy, against the defendants then before the court, without the absent parties; and that the demurrer was not well taken as to that part of the bill. The lord chancellor was inclined to think there could not be a partial demurrer for want of parties, and that the demurrer to the whole bill was therefore proper; and he directed the allowance of the demurrer. But upon a suggestion of Mr. Mitford that there were cases in which partial demurrers for want of parties had been allowed, the cause was directed to stand over until the next day. The counsel for the complainant, however, elected to pay the costs of the demurrer and amend the bill; so that the further examination of that question was rendered unnecessary.

The cases referred to by Mr. Mitford, were *Astley v. Fountaine*, (*Finch*, 4,) *Atwood v. Hawkins*, (*Idem*, 113,) and *Bres*

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*senden v. Decreets*, (2 Ch. Ca. 197.) In the first of those cases, it will be seen, by a reference to the very imperfect report of it in Finch, that the demurrer which raised the objection for want of proper parties was overruled. And I infer from the report that the demurrer, which was allowed, was a demurrer to a part of the *discovery* merely; and that its temporary allowance proceeded upon the then debateable ground, that where the answer explicitly denied the whole facts upon which the complainant's right to relief rested, the defendant was not bound to make a discovery of matters which were only consequential upon such right to relief. In the second case, however, if the report is correct, Lord Nottingham did allow a demurrer to a part of the bill, for want of proper parties; and allowed the case to proceed as to another distinct cause of suit, in which the absent parties had no interest. In the last case referred to by Mr. Mitford, I infer that the demurrer, which was for the want of an administrator *de bonis non*, of the personal estate of a judgment debtor, who was first liable for the payment of the complainant's debt, as a party defendant, was a demurrer to the whole bill. Indeed it could not well be otherwise; as the objection went to the whole of the complainant's claim, against the rents and profits of the estate received by the guardians of the heir at law of the judgment debtor. And it was probably held that a bad plea to a part of the relief sought did not overrule a good demurrer to the whole bill.

It does not necessarily follow, however, even if there are some cases in which it might be proper to allow the defendant to demur to particular parts of a bill, for want of parties, that a demurrer to the whole bill may not be sustained, where it appears from the bill itself that the complainant claims some specific relief, to which he is entitled upon the case made by his bill, but as to which the bill is defective for want of proper parties. Thus, if the complainant in his bill claims specific relief, against the defendant therein, and then adds a general prayer for such further or other relief as may be proper, and the case made by his bill entitles him to the specific relief prayed for, and no other parties were necessary to entitle him to that relief,

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the court, at the hearing, ought not to grant other or further relief, under the general prayer, when persons not before the court are necessary parties to such relief; even where the case made by the bill would have entitled the complainant to that relief also, against the defendant, if all the proper persons had been made parties. For in the case supposed, it is at least doubtful whether the defendant could have demurred to the whole bill, for want of parties. But if the bill, in such a case, had asked for a discovery as to some fact which was not material to the specific relief prayed for, and which discovery could only be material to a different kind of relief, to the granting of which relief other persons were necessary parties, I see no valid objection to allowing the defendant to demur to that part of the discovery sought; upon the ground of a want of proper parties. On the other hand, where the case made by the bill entitles the complainant to particular relief against the defendant, and would entitle him to further relief also if the necessary parties were before the court, and the prayer of the bill specifically asks for the more extended relief, to which he is not entitled in consequence of the defect of parties, the defendant may properly demur to the whole bill, for want of proper parties. This was so decided in the recent case of *Lidbetter v. Long*, (4 *Myl. & Cr. Rep.* 286,) by the vice chancellor of England. And that decision was affirmed by Lord Cottenham, upon appeal. That case cannot be distinguished in principle from the one now under consideration; and I am disposed to follow it as a correct exposition of the law of the court on this subject.

The decretal order appealed from must therefore be reversed. But as this was a new and unsettled question here, I shall not charge the respondent with the costs upon this appeal. The demurrer must be allowed, with the costs thereof, and of the argument in the court below; but with liberty to the complainant to amend his bill, within sixty days, by making Allen and the personal representatives of Pratt parties. He is also to be at liberty to make the heirs of Pratt parties, if he shall be advised to do so; or any other persons who have succeeded to the equi-

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table interests of Allen or of Pratt in the Ohio lands. And if the amendment is not made within the time prescribed, the bill is to be dismissed with costs.

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## DREW, adm'r, &amp;c. vs. DWYER.

Where a creditor's bill is filed in the court of chancery, upon the return of an execution at law unsatisfied, and the defendant is subsequently let in to defend in the action at law, the judgment being left to stand as a security to the adverse party, the proper course is to stay the proceedings, in the court of chancery, until the final decision of the court of law, upon the new trial, is ascertained.

The injunction in the creditor's suit should be retained until that time also; unless the defendant chooses to give security to pay whatever sum may be recovered against him in the action at law, together with the costs in the creditor's suit. But if such injunction is dissolved by the court, upon motion, a new injunction, founded upon the second verdict, ought not to be granted, except upon new facts.

Where proceedings are stayed upon a second verdict, in a suit at law, until an application for a new trial can be made, it is irregular for the plaintiff to take out an execution upon a judgment which has been ordered to stand as security for the amount of such second verdict. And he will not, by issuing such execution, entitle himself to have an injunction renewed, which had previously been dissolved in consequence of the granting of the new trial upon the first verdict.

THIS was an appeal from an order of the vice chancellor of the seventh circuit, granting an injunction. The complainant brought an action of trover against the defendant, in the supreme court, and recovered a verdict for about \$1100. Shortly after the trial the defendant obtained an order to make a case, and to stay the proceedings upon the verdict until the case could be argued, on condition that the plaintiff should be permitted to enter up his judgment upon the verdict in the meantime, to stand as security. The judgment was accordingly entered and docketed, in May, 1843. The case was subsequently made, and was argued before the circuit judge, who refused to grant a new trial. The plaintiff then issued his execution upon the judgment, which was returned unsatisfied. He thereupon filed an ordinary creditor's bill in this suit, in

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February, 1844, and obtained the usual injunction thereon. In the meantime the defendant had appealed from the decision of the circuit judge; and had given the security required by the fourth section of the act of April, 1832, relating to the supreme court and circuits. And in May term, 1844, he obtained an order for a new trial, by default; which order contained no allusion to the judgment which had been entered to stand as security, under the order of the circuit judge. The defendant therefore pleaded the order of the supreme court, for a new trial, and the orders and decision of the circuit judge previous thereto, in bar of this suit. He likewise applied to dissolve the injunction; which application was granted. The action in the supreme court was subsequently brought to trial, a second time, on the 12th of November, 1844, and a verdict was obtained for the plaintiff for \$750. And the same day the defendant obtained an order to stay the proceedings upon the verdict; and giving him thirty days to make a case, or bill of exceptions, for the purpose of moving for a new trial thereon. A day or two afterwards the complainant obtained an order for the defendant to show cause why the injunction in this suit should not be renewed. And within the thirty days, allowed for making the case or bill of exceptions, upon the second verdict, the vice chancellor, upon a hearing of the parties, made the order which was now appealed from.

*David Wright*, for appellant. The order appealed from should be reversed, because, I. The judgment upon which the bill was filed, ceased to have any force, upon the granting of the new trial; the supreme court not having inserted a clause in the rule granting a new trial, allowing the judgment to stand as security. (*Grah. Pr.* 634, 637. 6 *Cowen*, 390. 8 *Paige*, 374. 7 *Id.* 448. 3 *Id.* 506. 2 *R. S.* 127, 2d ed. 4 *Hill*, 125. 18 *Wendell*, 554. 12 *Id.* 254. See also *Grah. Pr.* 367, tit. *Restitution, and the cases there cited.*)

II. No injunction can be granted upon affidavit. If the complainant wished to avail himself of the verdict upon the new trial, he should have filed a supplemental bill. This injunction



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was issued upon the affidavit and not upon the bill. (2 R. S. 108, § 77, 2d ed.) It is true there is a bill on file in this cause, but not a bill upon which this injunction is founded. (See 1 *Hoffman's Pr.* 334, 5, 6.)

III. The costs of the former motion remained unpaid, and the complainant could have no relief until he paid these costs.

IV. The vice chancellor should have granted costs of opposing motion, to defendant, because complainant asked for more than he was entitled to; to wit, that the order of 29th October should be modified as to costs, and that he have leave to reply to defendant's plea. (2 *Paige*, 89.)

V. The order of 12th November, staying the plaintiff's proceedings for thirty days, had not expired when the motion of 10th December was made; and that order precluded him from any benefit upon the second verdict.

VI. The matter, at the time of the motion, stood thus: verdict 24th May, 1843, for \$1090,32 and judgment, and execution thereupon returned unsatisfied; that verdict set aside and new trial granted; a second verdict for \$750, and a stay of proceedings thereon; no fixed demand due from defendant to complainant; no judgment upon which to base a bill for an injunction; and no amount determined, upon the payment of which defendant's property could be released from the injunction.

*S. P. Nash*, for respondent. The judgment docketed in the supreme court was in no way affected by reason of the verdict being reduced upon the second trial.

THE CHANCELLOR. The bill in this cause was properly filed, and the usual injunction was regularly granted on such bill; because at that time the judgment was in full force, and all the complainant's proceedings, in the issuing and procuring the return of the execution, were perfectly regular. And if the order of the supreme court, granting a new trial, did not necessarily vacate the judgment, which had been entered up as security, upon the application to the circuit judge for a new trial, the plea of the defendant cannot be sustained. If so, the

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original injunction should have been retained until the final result of the new trial could be ascertained; unless the defendant chose to give security, to the satisfaction of the court, to pay whatever might be recovered against him in the action at law, together with the costs of this suit. The regular course, where a creditor's bill has been properly filed here upon an execution returned unsatisfied, and where the defendant is afterwards let in to make a defence, in the action at law, leaving the judgment to stand as a security to the adverse party, is to stay the proceedings in this court, until the final decision of the court of law, upon the case there.

The question whether the granting of the new trial, by the supreme court, necessarily vacated the judgment, which the circuit judge had permitted to be entered as security, as the condition upon which he would allow time to make a case and apply for a new trial, did not properly arise upon the application for a new injunction, founded upon the second verdict. For if an injunction was proper, before the final decision of the court upon the second trial, that was a good answer to the application to dissolve the original injunction; and the complainant should have appealed from that decision. Not having done so, he cannot apply to review the decision in this form; but he must show that something has occurred since the injunction was dissolved which entitles him to revive it. Here the affidavit, on the part of the defendant, shows that although a new verdict has been given, for about two thirds the amount of the first, the circuit judge thought there was probable cause for staying the proceedings thereon, until an application for a second new trial could be made; and that he had accordingly stayed the proceedings upon that verdict. During such a stay it would not have been regular to take out a new execution, upon a judgment which had been allowed to stand as security, for the amount of the second verdict. There was not, therefore, a sufficient ground for renewing an injunction which had been previously dissolved.

The order appealed from must be reversed, and the injunction must be dissolved. The costs of the defendant, in opposing

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the motion in the court below, must abide the event of this suit; and neither party is to have costs as against the other, upon this appeal. The complainant is also to have liberty to apply to the vice chancellor to revive the injunction, if he shall be so advised, after the verdict shall have become absolute and binding upon the defendant, by the refusal of the supreme court to grant a second new trial.

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### CHRISTIE vs. BISHOP and others.

A purchaser of a judgment, who had not actually paid the purchase money at the time of the commencement of a suit in this court to set aside a sale under such judgment, is not entitled to protection, as a bona fide purchaser, as against the complainant's equity.

A party who has parted with his right or interest in property, or in a chose in action, by an absolute sale and assignment to another person, cannot by his subsequent admissions affect the right of the purchaser.

And the fact that such admissions are made upon the oath of the former owner does not alter the principle; where such oath is *ex parte*, and without any opportunity for cross-examination of the person making the admissions.

It is a general rule not to allow admissions, or statements, in the separate answer of one defendant, to be read in evidence, to sustain the complainant's case against a co-defendant; unless the defendants stand in such a relation to each other that the admissions of each, if not under oath, would be evidence against the other; as in the case of several defendants standing in the relation of copartners, or as having a joint interest in the subject matter of the litigation.

The cases of *Field v. Holland*, (6 Cranch, 24,) and *Osborne v. The United States Bank*, (9 Wheat. 334,) commented on and explained.

It seems, that where a bill is taken as confessed against a defendant, before his death, and after his death the suit is revived against his heirs, or his personal representatives, they must apply to vacate the order, taking the bill as confessed, if they wish to controvert the allegations in the bill, or to set up any defence except such as has arisen since the entry of such order.

The heirs and personal representatives of a defendant who has suffered a bill to be taken as confessed against him, are bound by his implied admissions arising from his neglect to put in an answer.

The declarations of a party to a sale, or transfer, going to destroy or take away the vested rights of another, cannot, *ex post facto*, work that consequence; nor can they be regarded as evidence against the vendee or assignee.

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The answer of one defendant is not evidence against his co-defendant, except in those cases where the defendants are either legally or fraudulently combined; so as to create a unity of interest between them.

THIS case came before the chancellor upon an appeal from a decree of the late vice chancellor of the sixth circuit. In June, 1833, the complainant procured a loan, from the defendant Bishop and T. Hance deceased, for which he gave to them his bond and warrant for \$2500; upon which they caused a judgment to be entered up in the supreme court. Hance subsequently died, and Bishop, together with the defendant E. Hance administered upon his estate. In June, 1841, an execution was issued upon the judgment, in favor of Bishop as the surviving plaintiff in such judgment; under which execution the real estate of the complainant was sold by the sheriff, on the 2d of September in the same year. One parcel of the complainant's land was purchased at the sheriff's sale by Bishop, at the price of \$1200, and another piece by La Bar and others, for the price of \$800. The certificate for the last mentioned piece was subsequently assigned to Bishop. A third piece was sold to R. Townley for \$120; and certificates upon all the sales were duly executed by the sheriff and filed according to law. In December thereafter Bishop and E. Hance, by an instrument under their hands and seals, and in consideration of a covenant on the part of the defendant Robinson to pay them \$2000 and interest in one year, and the residue of the amount due upon the judgment in two years, with interest, sold and assigned to him the judgment against the complainant, and also all the right acquired by Bishop, either legal or equitable, by reason of his purchase at the sheriff's sale, and by the assignment of the certificate of La Bar and others, and the right of Bishop and E. Hance, or of either of them, to recover from the sheriff, or from Townley, the amount of the said Townley's bid upon the piece of land purchased by the latter at the sheriff's sale.

In May, 1842, the complainant filed his bill in this cause against Bishop and E. Hance; which bill was subsequently amended by making Robinson a party defendant, and stating the sale and assignment to him. The bill alleged, among other

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things, that the bond and warrant of attorney were given in pursuance of an usurious agreement, and that the amount actually loaned, and for which the bond and warrant were given, was only \$2375. It also alleged that the complainant in 1834 paid to Bishop and Hance \$300 upon the judgment, and that they gave him a receipt for \$175 only; that in the fall of 1835, and also in the fall of 1836, he made payments of the like amounts, for which similar receipts were given for \$175 only, on each payment; that in June, 1837, he paid them in property \$125, which was agreed to be paid and received as an usurious premium for forbearance for that year; that in the fall of the same year he paid them \$75, for which a receipt was given to answer on the judgment; and that in November, 1840, he paid to Bishop, the surviving judgment creditor, and who was then one of the personal representatives of Hance, the further sum of \$500 on the judgment; notwithstanding which several payments, the execution which was issued upon the judgment, in June, 1841, directed the sheriff to collect \$2840. The bill called for an answer on oath from the defendants, and prayed that an account might be taken and stated of the moneys and property paid by the complainant, upon or towards the judgment; and that, upon his paying to the defendants, in addition to the amount which he had already paid on or towards the said judgment, a sum sufficient to pay the amount actually loaned to him by Bishop and Hance, the certificates of sale of his property under the execution might be cancelled, or rendered inoperative, and that the judgment might be deemed satisfied; and for such further relief as he might be entitled to in the premises.

The defendants Bishop and E. Hance put in a joint and several answer, in which the former admitted, in effect, all the allegations in the bill as to the usury in the original bond and warrant, and in retaining the four several sums of \$125 each out of the payments made by the complainant, as extra premiums for the forbearance to enforce payment of the judgment from year to year. And E. Hance, who had no personal knowledge of these matters, swore to the truth of the same, as state

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by Bishop, upon her information and belief. The defendant Robinson, the purchaser of the judgment and of the certificates given upon the sale by the sheriff, put in a separate answer, in which he denied all knowledge as to all or any of the matters of the complainants' bill, except as to the sale and assignment to him of the judgment and certificates; which sale and assignment he swore in his answer was an actual and bona fide sale, and that he became liable by his covenant to pay the whole amount of the judgment, as before stated. No proofs were taken by either party, and the cause was brought to a hearing upon the pleadings. The vice chancellor decided that the defendant Robinson was not entitled to protection as an assignee of the judgment; but considering the prayer of the bill as an offer to pay the amount actually due after deducting the payments made by the complainant, he directed a reference to a master to ascertain the balance due on account of the actual loan of \$2375, after deducting the payments. And he decreed that so much of the payments as was necessary should be applied towards the accruing interest up to the 20th of November, 1840, when the last payment was made, and the residue applied on the principal of the loan; that upon payment of that balance, with interest thereon from the time when it should be ascertained, the judgment should be cancelled and discharged of record, and the certificates of sale cancelled and the sale held void; but in case the complainant should neglect or refuse to pay such balance within the sixty days allowed for that purpose by the decree, the bill should be dismissed, without costs. The complainant appealed from the part of the decree which directed that so much of the payments as was necessary should be applied towards the accruing interest up to the time when the last of those payments was made.

*C. Humphrey*, for appellant. I. The agreement between the complainant and Thomas Bishop and Thomas Hance was usurious, and the judgment set forth in the bill as having been confessed for the purpose of securing the money loaned in pursuance of such agreement was therefore void. (2 *Paige*, 273. 21 *Wend.* 105.) Where there is a negotiation for a loan or advance of

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money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending, within the spirit and meaning of the statute. And whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious. (*Colton v. Dunham*, 2 *Paige*, 273.) The test of usury is, whether the substance of the transaction is really a loan of money, or the creation of a debt, whatever may be the form of the contract; and if so, whether the lender or payee has stipulated for or secured to himself, by means of the loan or arising either from it, or from any thing connected with it and forming a part of the transaction, any profit or pecuniary advantage he would not otherwise have been entitled to, exceeding the rate of interest allowed by law. (*Dowdall v. Lenox*, 2 *Edwards*, 274.) A profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of the usury laws, &c. (*Same case*; and *Bank U. S. v. Owens*, 2 *Peters*, 537.)

Was the transaction a loan of money, or of the credit of B. and H. to C. by virtue of which the money was procured for his use? The facts are, they procured \$2300 at the bank, on their own notes, and added to that sum \$75 of their own money, and lent the whole to C., taking a judgment for \$2500. A part of the sum was therefore actually their own. 1. If the transaction was a loan it was clearly an express violation of the statute. (1 *R. S.* 760, § 1.) 2. If it was a loan of their credit, it is equally usurious. (*See Steele v. Whipple*, 21 *Wend.* 105.) 3. But if B. and H. contend that they not only loaned their credit, but had the trouble themselves of procuring the money for the use of C., is the transaction usurious? In the case of *Steele v. Whipple*, the court, to a qualified extent, recognize the doctrine, on the authority of *Ex parte Gwyn*, (2 *Dea. & Chit.* 12,) that bona fide expenses and trouble actually incurred may be paid on a loan, besides interest; though the lender

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be not engaged in trade. "But," say the court, "if this be so, none is actually shown in the case at bar. The money was procured by the endorser and withheld until the borrower came to his terms." (*Id.* 106.) That case is analogous to this, in all its leading features, with this exception, that in the present case B. and H. applied part of their own money to make up the sum loaned; which circumstance goes to prove that in the intention of the parties the transaction, at the time, was regarded as a mere lending of money. (*See also Costar v. Dilworth*, 8 Cowen, 299. *Crane v. Hubbell*, 7 Paige, 413.)

II. The answer of Bishop was evidence against Hance, his co-defendant. 1. They admit a joint interest. 2. They are both administrators of T. Hance. 3. Bishop and Hance were partners in the original transaction, and the control of the business survived to Bishop. The rule that the answer of one defendant cannot be read in evidence against a co-defendant does not apply to a case where the defendants are partners in the same transaction. For in such cases the answer or confession of either is evidence against the others. (*Am. Ch. Dig. tit. Evidence*, 343. 1 *Gall.* 630. 3 *Haywood*, 310.) Where one defendant succeeds to another, so that the right of one devolves on the other, and they become privies in estate, the rule does not apply. (*Osborne v. U. S. Bank*, 9 *Wheat.* 738.) After a co-partnership has been established aliunde, an answer of one of a firm is evidence, in a court of law, against the company, to show admissions of the plaintiff's demand. (4 *Stew. & Porter*, 34.)

III. The demand was invalid in the hands of the assignee, Robinson; who took the same subject to complainant's rights. The assignee of a judgment takes it subject to all the equities which existed against it in the hands of the assignor. (*Webster v. Wise*, 1 *Paige*, 319.) There is no rule in equity better settled than that a bond, or other chose in action, is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee. (*Clute v. Robinson*, 2 *John. Rep.* 612.)

IV. The complainant should be credited with the payments



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made by him; as stated and admitted by the pleadings. And on payment by him of the balance of the sum actually loaned, the certificates should be cancelled and the judgment satisfied of record. The complainant asks to be relieved on paying the sum actually loaned, without interest. The revised statutes provide that it shall not be necessary, on filing a bill for discovery, to pay, or offer to pay, any interest whatever on the sum or thing loaned, &c. nor shall a court of equity require or compel the payment or deposit of the principal sum, or any part thereof, as a condition of granting relief, &c. In this case the answer discloses all that is demanded by the prayer for discovery in the bill. The former statute of usury, (1 R. L. 64,) did not prescribe the terms upon which the court of chancery might order discovery, or grant relief. The court then required a payment, or an offer to pay, the sum loaned, and lawful interest; as a condition of either. (*Fanning v. Dunham*, 5 John. Ch. 22.) But the revised statutes prescribe a different rule. (See 1 R. S. 761, § 8.) There is a class of cases in which the borrower is compelled to resort to a court of equity for relief; as, for instance, a judgment entered on a bond and warrant of attorney, &c. (See *Livingston v. Harris*, 11 Wend. 329.) The principle established in that case, which arose under the provisions of the revised statutes, is that where discovery is asked for, as well as relief, it is necessary to pay or offer to pay the sum actually loaned, without interest. (S. C., 3 Paige, 528.) The bill also prays for general relief. By the act of 1837 it is not necessary to pay, or to offer to pay, either principal or interest, as a condition of either discovery or relief. (*Laws of 1837*, p. 486.) The offer of the complainant was entirely gratuitous, and he is entitled to the relief he asks, upon complying with the terms of his offer, as made.

V. The decree should have been according to the offer of the complainant, and the prayer of the bill; and with costs to be paid by the defendants. The offer was to pay the balance, after deducting the whole amount actually paid from the sum actually loaned. The complainant did not offer to pay any

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interest. The decree of the vice chancellor should be modified accordingly.

*B. Johnson*, for respondents. I. The complainant has entirely failed to prove the allegations in the bill in respect to the usury. The only evidence on the subject is contained in the answer of Bishop; and he expressly denies the agreement as set out by the complainant. The court therefore cannot decree the bond, warrant and judgment to be void as to any of the defendants. (*Cunningham v. Freeborn*, 3 *Paige*, 564.) To constitute usury there must be a corrupt agreement. (2 *Cowen*, 679, *n.* and *p.* 704.)

II. If the facts detailed by Bishop are of importance to the complainant, they are only so as against himself, and cannot affect the rights of Hance. If therefore any relief is granted, it can only be as against Bishop; and his interest is one third of the sum loaned. But no relief can be decreed against him; for the case must be made out against both, if at all. The answer of one defendant is not evidence against his co-defendant, except in special cases, when defendants are partners; and not then without some act of concurrence by the other. (*Phoenix v. Ingraham*, 5 *John. R.* 413. *Judd v. Seaver*, 8 *Paige*, 553.) If any relief is granted, it should be as against Bishop *pro tanto*. (See 8 *Paige*, 555.)

III. The judgment in question having been rendered before the act of 1837, (*Sess. Laws of 1837*, *p.* 486,) the complainant could not come into this court for discovery and relief without offering to pay the sum actually loaned, with lawful interest. (*Campbell v. Morrison*, 7 *Paige*, 157.) In this case relief is not asked on those terms; and without such an offer Bishop would not have been bound to disclose the facts in his answer.

IV. The defendants Bishop and Hance are alleged to be administrators of Thomas Hance deceased. And certainly the declarations of either are not competent as against the heirs, or those entitled to a distributive share of his estate; especially when such declarations are to work a forfeiture. (*Osgood v. Manhattan Co.*, 3 *Cowen*, 612. *Gray v. Patterson*, 1 *Esp. N. P. Cas.* 135.)

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V. As respects the defendant Robinson, it cannot be pretended there is the least evidence to affect him. Bishop's declarations cannot, and could not at any time, be evidence. There is no community of interest. And the declarations of a vendor after the sale are incompetent to affect the vendee. (5 *John. R.* 413.)

VI. Robinson, as the purchaser of the judgment, cannot be affected, even if usury is established as between the original parties. As respects him and Mrs. Hance, therefore, the complainant's bill should be dismissed with costs; and it should be dismissed as respects Bishop, because he had parted with his interest. (*Jackson v. Henry*, 10 *John.* 185. *Cuthbert v. Haley*, 8 *Durn. & E.* 390.) The rendition of the judgment was the act of the court, and was not void. (*Wardell v. Eden*, 1 *John.* 531, n.)

THE CHANCELLOR. The answer of Bishop admits facts which show, as against him, that the original bond and warrant were given to secure a usurious loan. And as the legal title to the judgment was in him by survivorship, and as he was also one of the personal representatives of Hance, his co-plaintiff in the judgment, the vice chancellor was right in supposing his answer was also sufficient proof of the facts, so far as the estate of Hance was interested in the judgment. Again; E. Hance has joined in the answer with Bishop, and sworn to her belief of the truth of the several matters which, in the answer, are stated to be true upon his own knowledge. The answer therefore admits the usury, so far as the original defendants in the suit had any interest in the judgment at the time of filing the original bill. And if those defendants, or either of them, had been the actual owners of the judgment, and of the certificates of sale by the sheriff on the execution, at the time of the commencement of this suit, the complainant would have been entitled to all the relief specifically prayed for in his bill; without any further proof of the usury than what is contained in the joint and several answer of Bishop and E. Hance. In that case, the only question for consideration would have been as to the construction of the prayer for relief.

From the peculiar phraseology of that prayer it is difficult to ascertain whether it was intended as an offer to pay what was

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equitably due upon the judgment, after deducting the several sums paid for principal and interest, and usurious premiums for forbearance from time to time; or was only intended as an offer to pay the original sum loaned, without interest, after deducting from the amount of the original loan the whole amount of such payments, as an offset against the principal of the loan. The vice chancellor appears to have adopted a third construction. And he has treated the payments as only applicable to the principal moneys loaned, so far as they exceeded the legal interest due upon the loan at the time such payments were made; but has not required the complainant to pay interest on the balance remaining due upon the loan, subsequent to the last payment. In the view which I have taken of the case, however, it is not necessary to inquire which of these several constructions of the prayer of the bill was right. For the complainant was not entitled, upon the facts of the case as they appear upon the pleadings in reference to the defendant Robinson, to as favorable a decree as the vice chancellor has actually made. And if Robinson had appealed, I should have been compelled to reverse the whole decree, and to dismiss the bill as to him; and to make a decree against the other defendants, directing them to refund to the complainant the moneys received from him, and so much as they had realized or were entitled to receive from Robinson upon the sale under the judgment, after deducting therefrom the \$2375 actually loaned to the complainant, and the legal interest thereon. In other words, the complainant would have been entitled to the same decree against Bishop and E. Hance as if he had paid the whole amount directed to be collected upon the execution, to Robinson, as the assignee of the judgment; and had then filed his bill against Bishop and E. Hance to recover back all the usurious premiums which he had paid to Bishop and Hance, and also those which he had been compelled to pay to the assignee of the judgment.

The vice chancellor was right in supposing that Robinson, who was the purchaser of a mere chose in action, and who had not actually paid the purchase money therefor at the time of the commencement of this suit, was not entitled to protection as a

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bona fide purchaser, as against the complainant's equity, if he had any. But in making the decree appealed from, the vice chancellor appears to have entirely overlooked the circumstance that the fact of the usury, as alleged in the bill, is not admitted by the answer of Robinson; but that on the contrary it is denied, upon the information and belief of this defendant, in the general traverse at the conclusion of his answer. The bill called upon Robinson to state what was the consideration of the assignment to him, and whether the same was an actual and bona fide sale. And the answer, which is responsive to the bill in this respect, is that it was an actual and bona fide sale. In other words, it was not a mere nominal transfer of the sheriff's certificates, and of the balance due upon the judgment, for the use and benefit of the assignors. And if the complainant has not succeeded in proving the fact of usury in the judgment, as against the defendant Robinson, the latter is entitled to retain the benefit of his purchase; and the remedy of the complainant should have been against the assignors, for what they were equitably liable to pay, upon their own admission of the facts as against themselves.

The vice chancellor, in making his decree, probably proceeded upon the supposition that the answer of Bishop, under whom Robinson claimed by assignment, was evidence, as against the latter, that the judgment was usurious. This would have been so, if the sale and assignment to Robinson had been made subsequent to the putting in of such answer. But a party who has parted with his right or interest in property, or in a chose in action, by an absolute sale and assignment to another person, cannot, by his subsequent admissions, affect the right of the purchaser. Indeed, the supreme court of this state has gone still further, and has held that the admissions of a former owner of personal property, or of a chose in action, even if made before he parted with his title, are not evidence as against his vendee. (*Beach v. Wise*, 1 *Hill's Rep.* 612. *Stark v. Boswell*, 6 *Idem*, 495.) And it is said in a note to the last mentioned case, that the doctrine of these cases was directly sanctioned by the court for the correction of errors, in December, 1844, in the case of *Paige v. Cagwin*. I agree with Mr. Justice Bronson, however,

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that the rejection of the admissions of the former owner of personal property, or of choses in action, other than negotiable securities, made by such owner before he parted with his interest in the property, was a departure from a well established principle of the law of evidence. And if it is hereafter to be followed, it must be upon the ground that the question is no longer open to discussion in the courts of this state. It would however be equally a departure from principle to allow admissions of a former owner of property, made after he had parted with all his interest therein, to be given in evidence; to affect the right of the purchaser, in a contest with a third person. And the fact that such admission is made upon the oath of the former owner, does not alter the principle, where such oath is made ex parte, and without any opportunity for the party against whom it is to be used, to cross-examine the person making such admission. It is a general rule, therefore, not to allow the admissions or statements, in the separate answer of one or more defendants, to be read in evidence in this court, to sustain the complainant's case against a co-defendant, unless they stand in such a relation to each other that their admissions, not under oath, would be evidence against each other; as in the case of several defendants standing in the relation of co-partners, or as having a joint interest in the subject matter of the litigation. (*Clark's Ex'rs v. Van Reimsdyk*, 9 *Cranch*, 156. *Pritchard v. Draper*, 1 *Russ. & Myl. Rep.* 200. *Gres. Ev. in Eq.* 24.) There are indeed two cases in which the late Chief Justice Marshall is supposed to have expressed an opinion that the rule, that the answer of one defendant could not be read in evidence against another, except when they hold a joint interest, does not apply to the case of a defendant who has derived title to the subject matter of the litigation, under or through the one whose answer is offered in evidence against such defendant. (*Field v. Holland*, 6 *Cranch*, 24. *Osborne v. The United States Bank*, 9 *Wheat. Rep.* 332.) And I see that the first of these cases is referred to by Professor Greenleaf, in his recent and very valuable treatise on the law of evidence, (*Greenl. Ev.* 210, § 178,) as sustaining the same principle.

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In the case of *Field v. Holland* this precise question was not before the court; and the opinion of Chief Justice Marshall only goes to the point, that the answer of a defendant through whom the co-defendant claims is evidence in favor of such co-defendant, as to matters which both were called on to answer; in relation to transactions which took place before the sale to such co-defendant. It may perhaps be inferred from the language of the chief justice, in that case, that if the answer of Holland had admitted the facts charged in the complainant's bill, instead of denying them, it could have been used as evidence against his co-defendants; who had purchased under the judgment in his favor against Cox. But there certainly was nothing to authorize the reporter, in his syllabus of the decision in that case, to state, as a point decided by the court, that the answer of one defendant is evidence *against* other defendants claiming through him. In the case of *Osborne v. The Bank of the United States*, the question arose as to how far the answer of one treasurer of the state of Ohio was evidence against his successor in office, as to the identity of funds taken from the bank by the former treasurer; both being joined as defendants in the same suit. And in reference to the principle of evidence, that the answer of one defendant cannot be read in evidence against another, Chief Justice Marshall says, "this is generally but not universally true. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus if an ancestor die pending a suit, and the proceedings be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence establishing any fact against him, might be read also against the person who succeeded to him." And it certainly seems to have been the opinion of the court in that case, that these principles, the correctness of which no one can dispute, were applicable to the case of an answer put in by a defendant who had parted with all his interest in the subject matter of the litigation, previous to the commencement of a suit, to one who was afterwards made a co-defendant with him in

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such suit. But there is a very manifest difference between that case and the cases supposed in the opinion of the learned chief justice. For in the cases supposed, the answer of the ancestor or of the deceased party is an admission made by him, while he was the owner of the subject matter of the litigation, and as such may be given in evidence against any person claiming title under him subsequent to such admission. And upon the same principle, if a bill is taken as confessed against a defendant before his death, and the suit is subsequently revived against his heirs or personal representatives, they must apply to vacate the order taking the bill as confessed; if they wish to controvert the allegations in the bill, or to set up any defence except such as has arisen subsequent to that order. For, the suffering of the bill to be taken as confessed against him was an admission by the original defendant, while he was alone interested in the subject matter of the litigation, that the allegations in the complainant's bill were true, and that he had no valid defence to the claim made by the complainant, except such as appeared from the bill itself. The question now under consideration did not necessarily arise in the case of *Osborne v. The United States Bank*; as the answer of Sullivan, in that case, contained a distinct admission that he received the money in controversy from Currie, his predecessor in office, who informed him that it was the money which had been taken from the bank. That answer was therefore of itself evidence of the identity of the funds. For it contained evidence of the declaration of the former treasurer, made at the time he parted with the money, to his successor in office. It was not therefore evidence of a declaration of the former treasurer after he had parted with all his interest in the fund to the defendant Sullivan. And as I understand the case, the decision of the court is placed upon that ground; though it is evident the opinion of the learned chief justice was that the answer of Currie, under the circumstances of that case, was admissible in evidence as against his co-defendant.

But even if these two cases, in the supreme court of the United States, are to be considered as express decisions of that court



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upon the question now under consideration, and notwithstanding the respect which is justly due to the opinions of the very able and distinguished jurists who occupied seats upon the bench of that court when those cases were before them for decision, I do not feel at liberty to adopt such decisions as the law of this state; in opposition to the decision of the court of dernier resort here, and to the opinion of one who, as a judge, has had few equals either in this or any other country. In the case of *Grant v. The United States Bank*, (1 *Caines' Cas. in Error*, 112,) this question came before the court for the correction of errors upon an appeal from a decision of the then chancellor. The appellant Grant was the holder of a bond and mortgage originally given to Taylor, and assigned by him to McGregor, who afterwards assigned the same to Grant. And one of the principal questions in the case was whether this mortgage, in the hands of Grant, was a valid security for the amount therein mentioned and thereby secured. In the bill filed by the Bank of the United States against Grant, the holder of the bond and mortgage, Taylor and McGregor, and some other persons, were made co-defendants. The consideration of the mortgage was impeached by the answer of all of the former holders thereof; and the question arose whether that answer could be read as evidence against Grant the assignee. In reference to that question Mr. Justice Spencer, who delivered the opinion of the court, says: "I have no hesitation in saying that the answer of one co-defendant is evidence neither for nor against the other. The authorities cited maintain this position." And in conformity with that opinion, Grant obtained a decree for the full amount of his mortgage; notwithstanding the admission in the answer of his co-defendant, under and through whom he claimed such mortgage. A similar question arose in the subsequent case of *Phenix v. The assignees of Ingraham*, in the same court, (5 *John. Rep.* 412.) There the answer of Ingraham was offered in evidence, against his co-defendant Phenix, who claimed title to the property under him; for the purpose of establishing the fact that Ingraham made the assignment to Phenix in contemplation of bankruptcy, and to give the assignee a fraudulent

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preference. Mr. Justice Spencer again delivered the opinion of the court, which opinion was concurred in by Chief Justice Kent, and Mr. Justice Van Ness, and all the other members of the supreme court who were present at the decision. And in reference to this question, he says: "No proposition can be clearer than that the answer of one defendant is not evidence against his co-defendant; and that the declaration of a party to a sale or transfer, going to destroy or take away the vested rights of another, cannot, *ex post facto*, work that consequence, nor be regarded as evidence against the vendee or assignee."

Nor are the decisions in the court for the correction of errors in this state, alone in conflict with the opinion that the answer of a defendant under or through whom a co-defendant claims to have derived his title to the subject matter of the suit may be read as evidence against the latter. For it will be found, upon examination, that similar decisions have been made in the courts of several of our sister states. And I have not been able to find any case in the reports of the court of chancery in England, or in Ireland, in which the answer of one defendant has been permitted to be read as evidence against another; except in those cases where the defendants were combined, either legally or fraudulently, so as to create a unity of interest between them. It is an established rule in chancery, says Judge Wallace, in *Winters v. January*, (*Litt. Sel. Ca.* 13,) that in no other case can the answer of a defendant be taken as evidence against a co-defendant.

In the case of *Hunt and Blanton v. Stephenson*, (1 A. K. Marsh. Rep. 570,) the precise question now under consideration came before the court of appeals in Kentucky. For upon examining that case it will be seen that the object of the suit was to obtain relief against the assignees of a debt, upon the ground that it had been paid to the assignor before the assignment thereof to the appellants. And the answer of the assignor was relied on as evidence, against his co-defendants, the assignees, to establish the fact that the debt had been paid to him, and was therefore not a valid and subsisting security in his hands at the time of the assignment. Upon that state of facts the court de-

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cided that the answer of the assignor could not be used as evidence against the assignees; and that as they had admitted nothing in their answer, the right to relief, as against them, must depend upon the evidence and exhibits in the suit. This decision was subsequently followed by the same court in the cases of *Moseley v. Armstrong*, (3 Mon. Rep. 288,) and of *Graham v. Sublett*, (6 J. J. Marsh. Rep. 44.)

In the case of *Collier v. Chapman and others*, (2 Stew. Alab. Rep. 168,) the supreme court of Alabama decided that the answer of one defendant could not be read as evidence against his co-defendant; *particularly* where it tended to invalidate a title made by the former to the latter. And the fact that one defendant, against whom the answer was sought to be used as evidence, had derived title to the property in controversy under or through the other defendant, who had put in such answer, was held not to take the case out of the general rule that the answer of one defendant cannot be read against his co-defendant. A similar decision was made by the same court, in the subsequent case of *Singleton v. Gayle*, (8 Port. Rep. 270.) And in the case of *Jones v. Hardesty and others*, (10 Gill & John. Rep. 405,) in the court of appeals of the state of Maryland, the two cases of *Field v. Holland* and of *Osborne v. The United States Bank*, were cited by counsel and specially relied on as establishing a different doctrine. But that court, in a well considered opinion, arrived at the conclusion that the doctrine of those two cases, so far as it related to this question, was wholly irreconcilable with an otherwise unbroken series of authorities on the subject, both English and American. The answer of L. Harwood was therefore rejected, as evidence against her co-defendants who claimed title to the subject matter of litigation under her.

There being no evidence in the present case, as against the defendant Robinson, to establish usury in the judgment assigned to him, and under which he has obtained his certificates of the sale of the appellant's lands by the sheriff, I cannot reverse or alter this erroneous decree, made by the vice chancellor, without being compelled to make one in lieu thereof which will be

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far less beneficial to the appellant. And as the appellant only claims to reverse a part of the decree which is not erroneous, and to obtain a modification of the decree to which he is not entitled, the proper course is to dismiss the appeal, with costs

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## PENTZ vs. HAWLEY and others.

[See 3 N. Y. 415.]

It is the duty of the receiver of an insolvent corporation, to call upon the stockholders to pay the balances due upon the shares of stock held by them respectively, where he has reason to believe the whole amount due from those who are solvent will be wanted for the payment of the creditors of the corporation, and the expenses of executing the trust.

And the mere fact that the whole amount due from any particular stockholder, for his stock, may not ultimately be wanted for that purpose if all the other solvent stockholders should pay their rateable proportions, according to the amount of their stock, will not authorize the particular stockholder to enjoin the receiver from proceeding to enforce the payment of the balance due from such stockholder, in the first instance.

If any balance remains, in the hands of the receiver of an insolvent corporation, after satisfying the debts of the corporation, and the necessary expenses of executing the trust, it must be distributed among the several stockholders who have paid in full for their stock.

THIS case came before the chancellor upon an order for the receiver of the property and effects of the Canajoharie and Catskill Rail-Road Company, to show cause why an injunction, or an order in the nature of an injunction, should not be granted; to restrain him from proceeding upon a decree in his favor, against the present complainant, for the payment of the balance due upon the shares held by the latter in the capital stock of the corporation at the time of the appointment of such receiver. The object of the present suit was to compel all the stockholders to contribute rateably towards the payment of the debts of the corporation; and to restrain the receiver from proceeding upon his decree, against Pentz, until all the debts of the corporation could be ascertained, and the amount which each stock-

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holder was bound to contribute could be settled, by a decree in this suit.

*S. Sherwood*, for the complainant.

*M. T. Reynolds*, for the receiver.

THE CHANCELLOR. There is nothing in the complainant's bill in this case entitling him to an injunction, or to an order to stay the receiver from collecting the amount which the assistant vice chancellor has decreed to be paid. Upon this application the court must presume that the decree against the complainant was right, and that the receiver was entitled to recover against him the whole of the balance due upon his stock in the corporation. For if there was any good reason why the present complainant ought not, in equity, to be required to pay to the receiver the balance due upon his stock, it was a proper ground of defence to the suit before the assistant vice chancellor. And if an equitable defence existed, and the facts constituting such defence were properly before the court in that suit, the remedy of Pentz is by appeal from the decree of the assistant vice chancellor, and not by an injunction bill to stay the proceedings upon that decree. The mere fact, however, that the whole amount of the balance due upon the complainant's stock may not ultimately be wanted, to pay the debts of the corporation, if all the other solvent stockholders should pay their rateable proportions of what still remains due upon their stock, does not necessarily render it inequitable that the receiver should compel the several stockholders to pay the balances due from them respectively, in the first instance. For if any balance should remain in the hands of the receiver, after satisfying the debts of the corporation and the necessary expenses of executing the trust, it will be distributed among the several stockholders who shall have paid in full for their stock; so as to produce perfect equality among them. And it might be great injustice to the creditors, of an insolvent corporation, to compel them to wait for the whole amount of their respective debts, until it could be

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ascertained, by a protracted litigation with all of the stockholders, how much each of such stockholders was liable and able to pay. The legislature appears to have contemplated a different proceeding in the case of the voluntary dissolution of a corporation. For by the 69th section of the article of the revised statutes on that subject, (2 R. S. 469,) it is made the duty of the receiver to collect from the stockholders the sums remaining due upon their several shares of stock; and after paying the debts of the corporation, and the expenses of executing the trust, to distribute the residue of the fund among the stockholders who may be entitled to the same. I presume, however, that it would not be necessary, even in that case, where all the stockholders had paid equally upon their stock, and the funds of the corporation in the hands of the receiver were sufficient to pay all debts and expenses, to compel the stockholders to pay up in full; for the mere purpose of re-distributing the money among them, in the same proportions. But it is unquestionably the duty of the receiver to call upon the stockholders to pay up in full, where he has reason to believe the whole amount due, from those who are able to pay, will be wanted for the payment of the creditors of the corporation, and for the expenses of executing the trust. In the case under consideration the affidavit of the receiver renders it highly probable that the whole amount, which can be collected from solvent stockholders, will be wanted to pay the debts of the corporation, and the necessary expenses. And if the assistant vice chancellor is right in supposing that the 42d section of the article of the revised statutes relative to proceedings against corporations in equity is applicable to a receiver appointed under the 36th section of that article, it was not only the right but the duty of the receiver, in the present case, to proceed at once to collect, from all of the solvent stockholders, the balances remaining due upon their respective shares. Upon that question I do not intend to express any opinion at this time.

But as the complainant is not entitled to a stay of the proceedings upon the decree, either by an injunction, or by an order in this suit, the order to show cause must be discharged, with costs to be paid by the complainant.

**BRADLEY vs. BOSLEY.**

[Referred to, 9 Bradw. (Ill.) 448.]

Where A. sold to B. a farm, and agreed to receive, in part payment thereof, a lot owned by B. in Illinois, with the value of which A. was unacquainted; and B. thereupon made false representations as to the character, situation and value of the Illinois lot, to induce A. to take the same in part payment for the farm sold; which A. accordingly did, allowing B. for the Illinois lot a sum greatly beyond its value; *Held*, that A. had an equitable lien upon the farm sold by him; for the amount of the difference in value between the Illinois lot, as it really was, and the value, as it would have been, had B.'s representations been true; with interest, on such difference.

If a vendor of land, knowing that the purchaser is unacquainted with its situation or value, makes a false representation as to any matter which, if true, would materially enhance the value of the property, he is, in equity, bound to make his representation good.

Where a party has been defrauded by another, in the purchase or sale of property, he may rescind the contract, so as to restore the parties to the same situation they were in when the contract was made; or he may affirm the contract, so far as it has been executed, and claim a compensation for the fraud.

But it must be a very special case which will authorize the injured party to come into a court of equity to have a contract partially rescinded; and it must be one in which the court can see that no possible injustice will be done by such a course.

In cases of fraud a court of equity has jurisdiction, although the party seeking its aid might have obtained relief in an action at law.

A bill in equity for the purpose of obtaining a compensation in damages merely, to be paid by the defendant personally, cannot be sustained; where the defendant makes the objection at the proper time, by demurrer or answer, that the complainant has a full and perfect remedy by an action at law against the defendant.

It is a settled principle of equity, in all cases of fraud, that if the party who has been defrauded is entitled to come into this court for any relief, arising out of the contract as to which he has been defrauded, and where it is necessary for him to allege and establish the fraud in order to obtain such relief, he may obtain full relief here, without resorting to a suit at law; although as to a part of the relief claimed, he had a perfect remedy in an action at law for damages.

The vendor of real estate has an equitable lien upon the estate sold, for the unpaid purchase money, as between him and the vendee, in all cases; unless there is either an express or an implied agreement to waive such lien.

Where, by the fraud of the vendee, a part of the price of the estate sold in fact remains unpaid, although the vendor supposed he had been paid in full at the time there is no waiver of the equitable lien for the part of the price that actually remained unpaid.

A person having an equitable lien upon land, for the unpaid purchase money, may come into this court, in the first instance, to enforce such lien; without resorting to

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a suit at law to recover the amount. And as an incident to the right to enforce such lien, this court will ascertain the amount thereof.

THIS was an appeal from a decree of the vice chancellor of the eighth circuit, dismissing the complainant's bill. The complainant, in November, 1839, was the owner of a farm in Le Roy, which farm was subject to three mortgages thereon, amounting together to the sum of \$1350. And the defendant owned a lot of 220 acres of land in Illinois, which he had once visited, but which the complainant had never seen. A negotiation was entered into by the parties, for the sale of the Le Roy farm to the defendant, the complainant to receive the Illinois lot in part payment. This negotiation resulted in a written contract between them for a sale to the defendant of the Le Roy farm, together with certain farming utensils and other property, for the price or sum of \$4000, to be paid for by a conveyance from him to the complainant of the Illinois lot, at the rate or price of five dollars an acre, and the assumption, by the defendant, of the payment of the three mortgages upon the Le Roy farm. And the rest of the \$4000 was to be paid in cash at a future day, and to be secured to the complainant by a bond and mortgage upon the Le Roy farm. This agreement was carried into effect in April, 1840; at which time the complainant conveyed the Le Roy farm to the defendant, subject to the payment by the latter of the three mortgages which were liens thereon. And the defendant gave the complainant a deed of the Illinois lot, and paid him a part of the balance of the \$4000 in cash, and gave him a bond and mortgage for the residue. That bond and mortgage the complainant subsequently sold and assigned to a third person. The defendant went into possession of the Le Roy farm, and afterwards paid off one of the mortgages upon the premises, which he had assumed to pay by his contract with the complainant. During the negotiation between the parties, the defendant made certain representations to the complainant, which, as the bill alleged, turned out to be false, in relation to the quality of the Illinois land, the situation and quantity of timber thereon, and the character of the soil, &c. In May 1841, the complainant



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went to Illinois for the purpose of settling upon the lot conveyed to him by the defendant. But finding the lands different from what he expected to find them, from the representations of the defendant, he returned in the latter part of June of that year; and tendered to the defendant a reconveyance of the Illinois lot, and demanded to be paid the \$1100 at which the lot had been estimated in the contract for the sale of the Le Roy farm. This demand not being acceded to, the complainant filed his bill in this cause, in which he charged, among other things, that the Illinois land was worthless and wholly unfit for farming purposes, and destitute of timber; and that the representations made to him by the defendant, before and at the time of the sale of the Le Roy farm, as to the situation, quality, and value of the Illinois land, in the several particulars mentioned in the bill, were falsely and fraudulently made. And he prayed that the defendant might be decreed to pay him the \$1100 with interest thereon from the date of the conveyances under the contract, together with the expenses and damages which he had sustained by his removal to Illinois to settle upon the lands, &c.; that the deed of the Illinois lot might be declared to be inoperative, upon a reconveyance of the lot by him to the defendant; and that the amount decreed to be paid by the defendant might be declared to be a lien upon the Le Roy farm; or that he might have such other relief as he was entitled to upon the case made by his bill. The defendant, in his answer, denied all fraud and false representations by him in relation to the situation, quality or value of the Illinois lands. The cause was heard upon pleadings and proofs. The vice chancellor decided that the complainant had no right to have the contract rescinded in part; and that the court would not entertain jurisdiction of the case for the mere purpose of decreeing a compensation in damages for a false and fraudulent representation in relation to the situation of the Illinois lot. He therefore declined examining the question whether the proofs in this case were sufficient to support the allegations in the bill on that subject.

The following opinion was delivered by the vice chancellor:

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WHITTLESEY, V. C. It struck me when the bill was read at the hearing, that the case made by it was a proper one for the jurisdiction of a court of law, and not such as should be presented to a court of equity. I had expected to find an objection of this character taken in the answer; and if such objection had been interposed in the pleadings, I should have no hesitation in deciding that the complainant's remedy was not in this court. That is, that this court was not the proper tribunal to pass upon this kind of remedy which the complainant has chosen to ask. The complainant's counsel urges that the misrepresentations charged are alleged to have been fraudulently made, and that this court has jurisdiction in matters of fraud. There can be no doubt of the truth of this proposition, in a general sense. In cases where a party is entitled to relief by reason of false and fraudulent representations, as to the character, quality, or situation of lands, I believe both courts of law and equity grant relief upon precisely the same legal principles. The party, receiving a conveyance of lands, who has been injured by such fraudulent representations, has his election either to sue the grantor and obtain compensation in damages, or to file a bill in this court and have the fraudulent contract rescinded, and both parties restored to the situation in which they were before; at the expense of the fraudulent grantor.

The two courts will grant relief upon the same state of facts; and hence they are said to have concurrent jurisdiction: but the kind of relief which they grant is very different. The one court gives relief by compensation in damages, the other by undoing all the parties have done under the contract, and replacing them in the position they occupied at first, and before the contract was made. In some cases, the result in each court is nearly the same; as where, upon a conveyance of land, the whole purchase money is paid, the grantee may procure a rescission of the deed, and a restoration of the entire purchase money from the fraudulent grantor. That is the only mode, then, by which parties can be restored to their former posture. The same substantial result would be reached by the judgment of a court of law, giving damages; which, if the land was en-

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tirely worthless, would be at least the whole amount of the purchase money.

In the case before me, if the contract between the parties had related only to the Illinois lands, and the complainant had taken a conveyance thereof upon such false and fraudulent representations as would have avoided the deed, and had paid the defendant \$1100 in cash therefor, he might, in a proper case, have had the deed rescinded, and the purchase money restored to him. The error of the complainant appears to be in supposing that his bill presents precisely the case last supposed. As I understand the contract between the parties, it was an entire one, embracing several subject matters besides the Illinois lands. The defendant, it is true, contracted to purchase the complainant's farm for \$4000. But the same contract provided that he should pay for it in a certain specified way; viz. by assuming the payment of certain mortgages, paying certain sums of money at certain times, and conveying 220 acres of land at \$1100. It was not agreed between them that the farm was worth \$4000 in cash, or that the Illinois lands were worth \$1100 in cash. These sums were assumed merely as measures of value between the parties. It was only in substance agreed that the farm was worth the responsibilities assumed, the cash paid and agreed to be paid, and the 220 acres of land. The contract was an entire one, and must be taken together. Neither party is, however, for that reason, the less bound to act in good faith, or less responsible for fraudulent representations. If there was such fraud in it as upon settled principles would entitle the injured party to relief, he might obtain it in a court of law; by suing for damages, without rescinding the contract. But I understand he cannot come here for relief without rescinding the whole contract; and to do that he must offer to restore what he has parted with. He cannot select a portion or single subject matter of the contract, and say I will receive this, and the remainder shall stand good. Though he can come into this court, on the ground of fraud, I suppose he must ask the kind of relief which this court usually dispenses, and treat the contract here as an entire one; and ask the entire restoration of the parties to

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their former condition, so far as it is practicable, or he will not be heard here, but left to such damages as a jury would give him.

This is the view that I should have entertained of the case as here presented, if the objection that the complainant had an adequate remedy at law, had been taken by demurrer or had been specifically set up in the answer. But no such objection is taken in the pleadings, and it is made for the first time at the hearing. It has been repeatedly held that such an objection comes too late at the hearing. (*Wiswall v. Hall*, 3 Paige, 313. *Underhill v. Van Cortlandt*, 2 John. C. R. 369. *Ludlow v. Simonds*, 2 Caines' Cas. in Error, 40.) It is too late, after a defendant has put in an answer submitting himself to the jurisdiction of the court, without objection, to insist that the complainant has a perfect remedy at law; unless this court is wholly incompetent to grant the relief sought by the bill. (*Grandin v. Le Roy*, 2 Paige, 509. *Hawley v. Cramer*, 4 Cowen, 727.)

This rule must prevail in this case, if this court is competent to give the relief sought by the bill. The relief asked, as we have seen, is of a character sounding entirely in damages. This has always been considered as a matter peculiarly proper to be passed upon by a jury; and this court will not generally entertain a bill to assess damages upon a mere contract. (*Hatch v Cobb*, 4 John. C. R. 559.)

Sometimes it grants compensation in damages as incidental to some peculiar ground of jurisdiction, as in the case of a bill for specific performance, when performance has become impossible, and in some similar cases; but as a general rule it never entertains jurisdiction for the mere purpose of giving damages, and as the primary object of the bill. This bill prays indeed, that the deed of the Illinois lands may be rescinded, and the \$1100 agreed to be the purchase money paid therefor, repaid. But we have seen that this court will not rescind this deed, or a part of the contract merely, without rescinding the whole; so that in the manner this case is presented, it is in effect but a mere action on the case for the recovery of damages, for the fraudulent representations as to the character and quality of the

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Illinois lands. The mode of proceeding in this court does not render it an appropriate tribunal for the trial of such cases. They have always been deemed foreign to its jurisdiction, and they have been left to be passed upon by the courts of law, with the assistance of a jury. If we are to sit here and try such cases, merely because the defendant does not object in his pleadings, we may, by the connivance of parties, find before long that the functions of the court of chancery are turned from their legitimate subjects of exercise, and expended upon matters wholly foreign to its proper duties. The court itself will take care to preserve the landmarks of its jurisdiction better.

It cannot be supposed that this court would try an action of slander, or libel, by the command, sentence, or even consent of the parties; and yet such trials would, in my judgment, be but little different in principle, from trying causes like this, which, in its effect, is merely an action for damages, though it is for damages arising out of a fraud.

It is not, however, proper or just that the defendant should put in an answer to such a bill, and involve the expense of taking proofs, raising no objections to the jurisdiction of this court, and then leading the complainant on in litigation; when upon the face of the bill itself the complainant shewed a case not proper to be heard here. He should have demurred, or not raised his objection at all at the hearing, unless he had at least intimated his intention so to do in the answer. For this reason he cannot have full costs. (*Murray v. Graham*, 6 *Paige*, 622.) This view of the case will render it unnecessary to examine the proofs as to the alleged fraudulent representations.

The complainant's bill is dismissed, but he is to pay the defendant such costs, and such costs only, as he would be entitled to on the allowance of a demurrer to the bill.

*D. H. Chandler*, for appellant. I. This court has jurisdiction of the subject matter stated in the bill, and may decree satisfaction, in damages, in the way and manner, and to the extent prayed for. Had the complainant brought his suit in a court of law, to recover damages for the alleged fraud, the only

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remedy he could have had in that court, would have been the recovery of the difference between the price of the land, and its actual value; testing this difference by the price given, and its actual value as proved. But that court would have no power to cancel the deed executed to the complainant. The title of the property would still remain in him, and he would receive the difference in value. This court, has a more extended jurisdiction, as to the remedy, and may frame its decree so as to give the complainant a complete remedy, for the existing evil.

It is an old head of equity, that this court has concurrent jurisdiction with a court of law, in cases of fraud. Although a court of equity may not rescind an entire contract in part, yet if there is fraud, in a particular point, wherein the whole contract is not involved, the court will decree compensation to the injured party, and let the contract stand. (*Jobling v. Dooley*, 1 *Yerg.* 289.) Where a grantor conveys, fraudulently, a greater quantity of land than he has title to, this court will decree compensation to the vendee, for the deficiency. (*Duvall v. Ross*, 2 *Munford's Rep.* 290. *Bedford v. Hickman*, 5 *Call's Rep.* 236. *Anthony v. Oldacre*, 4 *Id.* 489.) So where the grantor had not title to the whole of the land conveyed, the court decreed compensation for the deficiency. (*Collard's heirs v. Groom*, 2 *J. J. Marsh. Rep.* 487.) He who sells property by a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance may be occasioned by a mistake, he must still remain liable for such variance. (*M'Ferran v. Taylor*, 3 *Cranch*, 270.) It is claimed that there is a wide difference in regard to the action of this court, as to what remedy it will apply, in cases where the contract has been wholly executed, and where it has not. In cases where the contract has been wholly executed, as in this case, before a discovery of the fraud, this court has a right to give the injured party compensation in damages, instead of decreeing a rescision of the whole contract; for to do that might be more prolific of injury than of benefit to the injured party. A decree annulling the whole contract for fraud, is founded upon the basis that it has not

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been completed, and that its completion, according to its terms, would be injurious to the rights of the party aggrieved. Such decree is also fitting to a case where the complaining party has partly executed the contract, and files his bill to be relieved from the further performance, and for a re-payment to him of such sum as he may have paid. Besides, it is not necessary in this case, that the court should annul the whole transaction, in order to do justice. The complainant alleges, that in making payment for the land sold by him to the defendant, he, the defendant, was guilty of fraud, in the thing in which he paid. The complainant has tendered back the subject matter of such payment, and now by his bill, demands compensation in money for the thing by which he was defrauded. Neither party sets up or alleges any other matter in derogation of the validity of the contract. And in this particular alone, is there any question made by either party. The right of redress is as palpable as if the defendant had paid in forged bank notes; or in personal property having latent defects, under the allegation of its being sound. The bill seeks indemnity, for the fraud, and for nothing else. It rests upon the same principle as if it had been filed for a specific performance of the contract. The conveyance of the Illinois land, being fraudulent in not passing such valuable interest as the defendant represented it to possess, is likened to a case where the party contracting to convey has not the title fee to the whole land conveyed. In such case this court would decree re-payment to the complainant of the proportionate part of the purchase money, with interest, if the purchase money had been paid. (*Pratt v. Law*, 9 *Cranch*, 458. *Simpson v. Hawkins*, 1 *Dana*, 305. *Collard's heirs v. Groom*, 2 *J. J. Marsh.* 488.) In such a case, too, this court, at the instance of the complainant, would decree a specific performance, as far as the same could be had, and issue a quantum damnificatus to assess damages as to the residue. (*Jones v. Shackelford*, 2 *Bibb*. 412. *Fisher's heirs v. Kay*, *Id.* 434. *Woodcock v. Bennett*, 1 *Cowen*, 711.) This court having concurrent jurisdiction with the courts of law in cases of actual fraud, and not being limited or restrained in the exercise of its equitable functions, can apply

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the exact remedy needful to the exigency of every case. The remedy in a court of law, in this case, would only compensate the complainant for the difference between what he allowed for the land and the value as it is proved to be. (*Monell v. Colden*, 13 John. 395.) This would leave the title of the property still in the complainant, it being depreciated and unsaleable. This court has the power to decree the deed void, for the fraud, and to give the complainant a full compensation in money, as the measure of his damages. This alone can restore the complainant to his rights.

The vice chancellor arrives at the conclusion that it is inconvenient for this court to assess the complainant's damages; and that it is his duty to protect himself against the imposition of a jurisdiction which he regards, according to the framing of this bill, as belonging exclusively to a court of law, and therefore dismisses the bill. The principle contained in the vice chancellor's opinion in this particular is contested for the following reasons. 1st. The subject matter of the bill relating to the fraud alone, confers jurisdiction on this court; and having such jurisdiction, it will entertain the cause and decree the relief prayed for. (*Adamson v. Evitt*, 2 Russ. & Myl. 66, reported in 6th Cond. Eng. Ch. Rep. 399, 6 Ves. 173. *Reigal v. Wood*, 1 John. Ch. 402. *Collard's heirs v. Groom*, 2 J. J. Marsh. 488.) See also the authorities above cited touching this point. 2d. If the defendant was guilty of fraud in the sale of the Illinois land, the deed given by him therefor, was void ab initio for that cause; and the complainant not having taken any security for the land sold by him to the defendant, other than the deed of the Illinois land, had a lien upon the land thus sold, for \$1100, the price of the Illinois land. This allegation alone, in the bill, confers jurisdiction upon the court, and draws after it all the other matters stated. Both vendor and vendee have their lien on the land sold, the former for the purchase money due, and the latter for what he has paid, in case it is restored to him. (*Farmer v. Samuel*, 4 Litt. Rep. 190.) A vendor of land, who has conveyed by deed, has a lien in equity upon the land, for the unpaid purchase money against



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the vendee, or purchasers from him, with notice. (*Watson v. Wells*, 5 Conn. Rep. 468. *Garson v. Green*, 1 John. Ch. 308. *Bagley v. Greenleaf*, 7 Wheat. 46, 50. *Outton v. Mitchell*, 4 Bibb, 239. *Galloway v. Hamilton*, 1 Dana, 576. *Ewbank v. Poston*, 5 Monroe, 287. *Wynne v. Alston*, Dev. Eq. 163.) The case of *Fish v. Howland and others*, (1 Paige, 20,) settles this doctrine fully, that the grantor of land has an equitable lien upon the estate sold, for the payment of the purchase money, and that this lien is not waived by the grantor's taking personal security; unless there is an express agreement between the parties that the equitable lien shall be waived. It is claimed, under this decision, that the agreement between the parties in this suit, that the complainant should take a deed of the Illinois land, and the actual taking it, was no waiver of the equitable lien which the complainant had on the land sold to the defendant; because the defendant defrauded the complainant, and hence the deed taken of the Illinois land, was void in its inception, and the agreement to take the deed was void also, for the same cause. The court having acquired jurisdiction, for the cause last stated, will retain the bill, and administer full justice between the parties. 3d. The general and true doctrine of this court is, that where parties, by consent, make a case for its determination, or where the complainant files his bill for a cause over which the court has not jurisdiction, or where a court of law has jurisdiction, or the party can obtain redress in a court of law, and the defendant does not demur or set up the objection in his answer, by way of demurrer, on account of jurisdiction, this court must of necessity hear and determine the case; unless it is wholly incompetent to grant the relief sought by the bill. (*Grandin and Le Roy v. Smith*, 2 Paige, 509. *Hawley v. Cramer*, 4 Cowen, 726, 727, and authorities there cited. *Bank of Utica v. City of Utica*, 4 Paige, 400. *Fulton Bank v. N. Y. and Sharon Canal Co.*, 4 Id. 132.) The last case is in entire conflict with the vice chancellor's notion, that this court will not decide a cause where no demurrer is interposed, or objection taken, in the answer, if the court shall find that a remedy exists at law. That case holds it to be the duty of the court

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in such a case, to hear and decide. 4th. The vice chancellor however, seems to refuse to take jurisdiction of the case, mainly because this court is incompetent to give relief, or the relief prayed for; and he seems to regard himself as incompetent to administer the remedy consistent with the practice of the court. The bill asks, that the deed of the Illinois land may be declared void, and that the defendant may compensate the complainant in money, to the amount for which that deed was received, and also for the expenses incurred by him in his journey to settle upon the land. The compensation asked for is specific and easy of ascertainment, so far as relates to the matter of the land; and as respects the damages, on account of expenses incurred in the journey to see the land, it is equally easy of ascertainment, through the intervention of a master. But the defendant contests this last claim, by proving, or attempting to prove, that the complainant did not intend to settle upon the land. The case that the court is to adjudge, is that made by the bill; and it does not involve any thing more than has been stated, and the simple question is, has the court the power, by the legal means at its control, to give the relief asked for. If it has, it can and should act. If it has not, then the dismissal of the bill for that cause would have followed from necessity. Allowing the principle to be true, as adopted by the vice chancellor, of giving relief in a case like this, (which is not conceded,) still the parties have made the very case embraced in the pleadings without objection by either. And the court has only to consider, if it has the power to give the relief asked for, as the case is made up.

This court, in the exercise of its ordinary powers, has at its control, two agents, whereby it can ascertain for the instruction of its conscience and judgment, all that is required to administer justice in this case; which agents it always employs, where it is in doubt, or where it would be inconvenient for itself to perform the duty. It may award an issue quantum damnificatus, which is done where the quantum of damages does not clearly appear, and it is proper for a jury to pass upon them. Or it may direct a reference to a master to inquire and take

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proofs of the quantum of damages, and report such proofs, with his opinion thereon.

The court will never award an issue to be tried by a jury, unless the facts on which it is to decide are peculiarly adapted to the decision of a jury; or unless the conscience of the court shall need the verdict of a jury to support its decree. (*Apthorp v. Comstock*, 2 Paige, 482. *Nice v. Purcell*, 1 Hen. & Munf. 3:2. *Fornshill v. Murray*, 1 Bland, 485. *Townsend v. Graves*, 3 Paige, 453.) In the last case fraud was charged in the bill, and the testimony was conflicting, to a considerable extent; yet the chancellor adopted the opinion of Lord Redesdale, that "it would be attended with infinite mischief, if courts of equity were to hesitate in deciding questions where sufficient evidence is before them." He held also that issues should not be directed except in those cases where there was a want of evidence; or where the testimony was contradictory, and so nearly balanced as to render it necessary to have an open and rigid cross-examination of the witnesses before a jury. There is no need of an issue or a reference in this case, so far as relates to the damages on account of the fraud. The price of the Illinois land is well ascertained by the consideration named in the defendant's deed to the complainant. The claim for damages set up on account of the journey made by the complainant from this state to Illinois, to examine the land, and as alleged to settle upon it, is not proved; that is, the quantum of expenses is not proved, although the going there for that purpose is proved. If damages for that cause, as an incident to the fraud, are allowable in this case, a simple reference to a master to take the testimony which the complainant may produce before him, will suffice; and this can be done after a decree settling the subjects of damages and making a reference for that purpose. But if that claim shall not be allowed, then the court can, by a simple computation of interest upon the sum of \$1100, decide and decree the amount of damage at once.

..... II. The defendant was guilty of fraud in the representations he made to the complainant as to the situation and quality of soil of the Illinois land, and as to the quantity of timber grow-

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ing or being thereon. Previous to the making the agreement the defendant had been upon the land and examined the same; and knew or professed to know its situation, quality and properties. But the complainant had never seen the land, and knew nothing of its quality or condition, except what he derived from the representations of the defendant, at and before the contract was made. The representations made by the defendant materially affected the value of the land, and operated as an inducement to the complainant to give a higher price than he would have done had the truth been told. This vitiates the sale. (*Woods v. Hall*, Dev. Eq. R. 11.) *Suppressio veri*, or *suggestio falsi*, vitiates a contract. If an express representation turns out to be untrue, it is immaterial whether the party making it knew it to be untrue or not. The fact that he was ignorant of its truth or falsehood avoids the contract, if his representation is false. (*Waters v. Wallingly*, 1 *Bibb*, 244. *Livingston v. The Peru Iron Co.*, 2 *Paige*, 390.) He who sells property by a description given by himself, is bound to make good that description. If it be untrue in a material point, although the variance may be occasioned by a mistake, he must still remain liable. (*McFerran v. Taylor*, 3 *Cranch*, 270.) Where, by the misrepresentation of a fact relating to a circumstance which the complainant was entitled to know, or by the concealment of a fact which the defendant was bound to disclose, the complainant was induced to make a purchase, and in consequence sustained a loss, it was declared that an action at law could be sustained for damages. But that a court of equity, with respect to the fraud, had a concurrent jurisdiction, and would exercise such jurisdiction so as to give relief. (*Adamson v. Evitt*, 2 *Russ. & Myl.* 66.)

III. The deed, from the defendant to the complainant, of the Illinois land, having been imposed upon the complainant by the fraud of the defendant, the complainant had a right to tender a re-conveyance of the land to the defendant; as a preliminary to an avoidance of it, and as the foundation of his claim to damages for the whole consideration of the deed. In the case of *Hoggins v. Becraft*, (1 *Dana*, 30,) it was decided that the vendee of a chattel, discovering a defect which the vendor fraudulently

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concealed, might return or tender back the chattel, and thus rescind the contract, or retain it and recover damages. The same rule exists at law. True it is that this court has a right to decree the sale void, and compensate in damages to the full extent of the purchase money, upon the vendee's restoring to the party the property received. But it seems to be a peculiarly fitting measure, as applicable to a court of equity, that the party claiming to be aggrieved by the fraud of another should offer to restore the property received, before coming into this court for relief.

The complainant is entitled to a decree for all the damages consequent upon the fraud practised upon him. And it should be declared that he has a lien upon the land conveyed to the defendant, by him, to the amount of \$1100, and the interest thereon from the 28th day of November, 1839, or from the 24th of April, 1840; that being the time when the deeds were executed; and that he have execution against the defendant for the collection of all the damages awarded to him.

*J. B. Skinner & O. Hastings*, for the respondent. With respect to the first claim, the counsel for the defendant insist that a bill cannot be sustained in this court merely for the recovery of damages on the ground of fraud. It has often been laid down as a general rule, that courts of equity and of law have concurrent jurisdiction in all cases of fraud. While this is true with respect to fraud as a foundation for relief, it does not hold with respect to the kind of relief administered by these tribunals; and courts of equity can no more entertain suits instituted directly for the recovery of damages, than courts of law can give relief by compelling the party to undo the fraudulent transactions and restore in kind the fruits of his fraud. In other words, the relief administered by these courts is different in kind; and while courts of equity act in a way peculiar to themselves, annulling the fraudulent transaction and compelling the party to restore what he has taken from the complainant by deceit, courts of law alone have the power to entertain actions instituted purely for the recovery of damages. It may not be

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easy to reconcile all the cases with this proposition. It will be conceded, however, that there are cases in which courts of equity cannot give relief in damages. And the distinction now contended for is the only one which will prevent a conflict of jurisdiction between our courts of law and equity; and it is one indicated by the different modes of proceeding which prevail in these tribunals.

It would be exceedingly inconvenient for a court of equity to entertain actions merely for the recovery of damages. Questions of damages which arise incidentally, in causes where a court of equity has jurisdiction on other grounds, are generally sent to a court of law for determination; except in cases where these damages are a mere matter of computation. (*Phillips v. Thompson*, 1 *John. Ch. R.* 150, 151.) And as a court of law is fully competent to give the required relief, there seems no possible reason for resorting to a court of equity for the recovery of damages in cases of fraud, which would not apply with equal force in favor of a suit in equity to recover the amount due upon a promissory note; or to recover damages for any violation of private right. But it is believed that this question is settled by authority. In the case of *Newham v. May*, (13 *Price*, 749,) the court of exchequer decided, that a bill filed simply for compensation, without other relief, to recover the difference between the actual and stated value of an estate sold, could not be supported on the ground of fraud; and that the jurisdiction of a court of equity to give damages in such cases, (cases of fraud,) was incidental to that of giving relief by enforcing the performance of contracts for the sale of real estate. See also the case of *Hardwick v. Forbes, adm'r*, (1 *Bibb*, 212.)

The cases cited by the counsel for the complainant are none of them cases of bills filed simply for the purpose of obtaining damages on the ground of fraud; and it is believed that no precedent for such a bill can be found. This seems a proper occasion for the court to draw a line of demarcation, which shall be visible to all, between those cases where a court of equity will, and where it will not, entertain jurisdiction in cases of fraud. Although there are cases in which the court has seemingly

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entertained the question of damages in cases of this character, yet they may be disposed of without yielding the principle contended for. The case of *Jopling v. Dooley*, (1 *Yerger*, 289,) cited by the complainant's counsel, appears, from the note of it, to have been a case where the complainant, by his bill, sought to rescind a contract for the sale of a lot of land, on account of a fraud, or misrepresentation, in respect to the lines of the lot sold; and in which the defendant resisted the claim. The court refused the principal relief sought; and perhaps gave, by way of relief, a compensation in damages. The case of *Adamson v. Evitt*, (2 *Russ. & My.* 66,) was a case where the defendant had negotiated the sale of an annuity, for three lives, to the complainant; and, as was alleged, had misrepresented the ability of the grantor of the annuity, or withheld important information from the complainant, with respect to the grantor's ability, for fraudulent purposes. It also appeared that the defendant was a trustee for the grantor, of a certain lease, and of a certain portion of his salary out of which the annuity was payable. And the bill prayed that the defendant might be answerable for the loss. Although the court *arguendo*, held that the bill was sustainable, it was not sustained in fact, but dismissed on another ground. The case of *Evans v. Bicknell*, (6 *Vesey*, 173,) was a case in which the complainant sought to charge a trustee for another, and the trust estate, with a sum of money obtained from the complainant by a third person; to whom the trustee had fraudulently delivered the title deeds, for the purpose of enabling him to obtain the money in question. The court held that the trust estate could not be charged, and dismissed the bill as to the *cestui que trust*, on that ground. It also decided that the bill was sustainable as against the trustee for damages, on account of the fraud alleged, but dismissed it as to him because the fraud was not proved.

In all these cases, it will be seen, that the bill itself contained sufficient ground for relief, without resort to the position contended for on the other side. In the case in *Yerger*, the right of the court to annul the contract on account of the fraud alleged, was undoubted. And in the case in *Russell & Mylne*,

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although it is not easy to tell what was in the bill, it is evident, from what was proved in the case, that it sought to charge the defendant as a trustee; and so the bill was sustainable on the ground of trust. And in the case in *Vesey*, one object of the bill was to charge an estate, of which the defendant was trustee, with the money claimed; and the cestui que trust was a party. So that this bill was also sustainable on the ground of trust.

In all these cases, then, the court had an acknowledged jurisdiction to give the principal relief sought for, and to try the questions upon which that relief was sought. Having jurisdiction for this purpose, although the facts failed to be proved, it would, upon the common principles of equitable jurisprudence, give the relief which was secondarily sought; as incidental to the principal relief prayed for. Besides, in two of these cases the bills were dismissed, and the points sought to be established by them, on the part of the complainant, were not involved in the decision of them. But it is said that the bill in the case before the court does seek to undo the fraudulent transaction, and restore the parties to the position they occupied before the sale. This is not true. The contract was entire. It was for the sale, by the complainant, of the farm in Le Roy; to be paid for partly in money, partly in assuming certain incumbrances upon it, and partly in the lands in the state of Illinois. The defendant has a right to say, upon the facts of the case, that but for the privilege of paying in part by a conveyance of the Illinois lands, he would not have bought the complainant's farm at all; and for that privilege he was willing to allow the complainant more than he could, or would, have paid in cash. It is submitted, that where the complainant agrees to receive land in part payment for his farm, and the defendant agrees to give it, no court has power to say he shall give money in lieu of the land. If he has been guilty of a fraud in misrepresenting the quality of the land, this court might, in a proper case, annul the whole contract, and place the parties in statu quo; or a court of law might give damages for the fraud. And it is believed that these are the only remedies which the complainant can have. The case cited from *Yerger* does not prove, if it has



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been correctly explained, that the complainant can affirm those parts of the contract which suit him, and disaffirm those parts which do not. Cases may be found, perhaps, to sustain the position, that where the principal relief sought by the bill could not be granted, because the facts proved were not sufficient to establish the claim set up, the bill was dismissed; although it appeared that the party was entitled to some relief, incident to the principal relief sought. These cases proceed on the ground, that as the court could not give the relief principally sought, it cannot give the relief which is incidental, for the want of jurisdiction. This is to make the jurisdiction of the court depend upon the truth of the facts set forth in the bill. Such a position may be a sound one. The court has, in such cases, jurisdiction of the case made by the bill, and that is enough. If the facts proved do not sustain the case, then the bill will be dismissed, not for want of jurisdiction, but for want of proof. The case of *Phillips v. Thompson*, (1 John. Ch. R. 131,) sustains the position, which we think the correct one, that where the court has jurisdiction of the case made by the bill, it will retain the bill for the purpose of giving incidental relief; although the complainant fails in his proof as to the principal relief sought. There is no reason to believe that if the bill in that case had contained simply a claim for damages, it would have been retained.

With respect to the second ground on which the complainant claims relief, that of lien for the purchase money, there seems to be no foundation whatever for it.

In the case of *Ganson v. Green and others*, (1 John. Ch. 308,) it is said that this lien exists where, from the terms of the contract, it is not implied that the parties did not intend that the lien should be preserved. In other words, that where it does appear that the parties did not intend that the lien should continue, and did not rely upon it, there it will be held not to exist. The same principle is also found in the case of *Fish v. Howland*, (1 Paige, 20.) That case also contains the further position, that where the vendee has given any other security than his mere personal obligation, for the purchase money the

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lien will be regarded as waived. Much more would the lien be regarded as having been waived where the parties, upon the sale, did an act which they call a satisfaction of the purchase money. In the case under discussion the purchase money was actually paid, by the conveyance of the Illinois land; or otherwise paid or secured upon the land. Without doing violence to the facts, it cannot be pretended that either party thought of retaining a lien upon the lands sold; nor can it be denied that both parties intended, at the time, to extinguish all claim for the purchase money except upon the securities then in existence, or given at the time. If every fact contained in the bill, upon which the notion of a lien is sought to be sustained, were conceded to be true, it would be perfectly clear that no lien existed in the case. Here the contract, so far as the present controversy is concerned, was that the defendant should pay in land, and not in money. The amount remaining due to the complainant, supposing the deed to be set aside, is due not in money but in land. The claim put forth in the bill is not for money due by contract, express or implied, but for damages on account of fraud.

In cases of fraud, the party may annul the contract and get back what he has parted with; which in this case would be the Le Roy farm. But this the complainant does not ask for, and could not have if he did, because he has put it out of his power to restore that which he received for it.

It may be said, perhaps, that inasmuch as the defendant did not object to the jurisdiction until the hearing, the objection came too late, and the court will give the relief sought. A doctrine like this is to be found in some cases; but it applies only where the relief sought falls within some one of the heads of equity jurisdiction. In such cases, although there is a complete and perfect remedy by way of suit or defence at law, the court will grant relief—holding that the defendant has waived his right to turn the complainant over to another forum. It is an old maxim that “consent cannot give jurisdiction.” Suppose the complainant should bring a bill to be paid the amount due him upon a bill of exchange or promissory note, and the defendant should not object to the jurisdiction of the court; would the court for that

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reason hear the cause? Or, suppose a bill should be brought by the complainant to obtain the possession of land in the occupation of the defendant; would the court try the right of possession, because the defendant did not object to the jurisdiction? If so, it would be in the power of suitors, without the consent of the legislature, to transfer the whole jurisdiction of our courts of law to this court.

A fair view of the evidence will not sustain the allegations of fraud contained in the bill.

*D. H. Chandler*, in reply. The counsel for the defendant assume and insist, that a court of law is the only tribunal which can award damages for a fraud committed, and that this court only exercises its power, in such a case, by annulling all that has been done, and restoring the parties to their original position; and that further than that this court has not the power to go. We insist that this court does, and always will, award damages where it becomes necessary to the due administration of equity between the parties; even touching matters over which chancery does not claim to have original jurisdiction, but which are incidents of the case made by the pleadings. In those cases where the bill makes a case confessedly within the jurisdiction of this court, but the prayer for relief is so broad that damages may be awarded instead of specific relief, and where either through the defect of proof to entitle the party to specific relief, or the inability of the defendant to respond to such specific relief as is specially asked for, this court acts in the way and manner presented by the emergency of the case. And if it is necessary, it resorts to the alternative of giving damages by way of compensation; in the same manner as a court of law would do. Or if it can grant in part, the specific performance of the relief prayed for, but for any of the causes before referred to, it cannot do so in whole, it then gives damages for the residue. This is a universal rule of this court; to confirm which, a reference to authorities is unnecessary.

The counsel for the defendant seem also to suppose that this court is restrained, in its jurisdiction, to certain specific matters;

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and that to transcend such limits would render its decrees *coram non judice*, and hence void. It is true, that where the statute has limited or regulated the exercise of jurisdiction of the court in specific or other matters, aside from the general jurisdiction which it has, its acts which do not conform to, or rather which are in hostility to such special provisions, might be void; or at least would not obtain judicial sanction or force. But being a court of general jurisdiction, which jurisdiction is to be exercised according to the forms of its practice, it is not restrained in the exercise of it as respects any subject, "unless it is wholly incompetent to grant the relief sought by the bill." Such is the doctrine in *Grandin v. Le Roy*, (2 Paige, 509;) and in *Hawley v. Cramer*, (4 Cowen, 726, 7.) Acting upon the principle here laid down, the chancellor held, in the case of *The Bank of Utica v. The City of Utica*, (4 Paige, 406,) that notwithstanding the complainant had a remedy at law more perfect than this court could administer, yet, inasmuch as the parties had stipulated that this court should exercise jurisdiction, that he could not refuse to exercise it; and he applied, in that case, the maxim *modus et conventio vincunt legem* to the question of jurisdiction. Furthermore, the doctrine of this case is in contradiction of the assertion of the defendant's counsel, that consent cannot confer jurisdiction. And it supports the principle before laid down, that the jurisdiction of this court, by consent, is as universal as its power to do justice.

But it is assumed by the defendant's counsel, that the court will decline the exercise of jurisdictional functions in all cases where the party has a remedy at law, although no objection is set up in the answer. The case of *Fulton Bank v. N. York & Sharon Canal Co.*, (4 Paige, 132,) settles beyond a doubt this question in favor of the accuracy of the complainant's position. In that case the chancellor distinctly lays down the rule, that if the defendant does not take his objection by demurrer, or in his answer, the court will adjudicate the case. And the defendant must be subjected to the extra expense of litigating the matter in this court; whether the subject matter of the case is or is not within the ordinary and acknowledged jurisdiction of the court.

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And that case goes the length of saying, that although the bill alleges matter of jurisdiction, which the proof does not sustain, for the purpose of escaping a demurrer, yet that the defendant, to avoid the exercise of jurisdictional functions by this court, must deny such matter; and insist that as to the other matters the complainant has a remedy at law. In the case of *The Bank of Utica v. The City of Utica*, before referred to, the parties assented, by stipulation, to this court taking jurisdiction. Such stipulation could not confer a greater power upon this court than the omission of the defendant to take his objection in the answer. In either case, the parties would stand upon the same footing.

The bill sets up a claim for, and prays that this court may decree that the complainant have, a lien upon the Le Roy farm for the amount of his damages; or for the purchase money of the Illinois land. This matter in the bill confers jurisdiction upon this court. And by the case last referred to, this jurisdiction cannot be intercepted by the defendant's answer; whether the complainant is entitled to such lien or not by the proofs made in the case.

It is denied by the counsel for the defendant that this court will award damages, although fraud was committed. In the case of *Bacon v. Bronson and others*, (7 John. Ch. 199,) Chancellor Kent distinctly held, that the complainant was entitled to damages in such a case; and he decreed that the premises in regard to which the fraud existed should be sold to satisfy those damages, and made a personal decree against one of the defendants for any deficiency. He most distinctly held in that case, that where a party, by an act of fraud, had deprived another of his security, such party should be personally liable for the damages. To the same effect is the case of *McFerran v. Taylor*, (3 Cranch, 270,) on the equity side of the supreme court of the United States.

THE CHANCELLOR. Upon a careful examination of the testimony in this case, I think the complainant succeeded in establishing the fact that the defendant was guilty of a misrepresentation as to the situation of the Illinois lot, and the quantity of

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wood and timber thereon, and as to the quality of the land ; and that by such misrepresentation the complainant was induced to allow for that lot, upon the sale of the Le Roy farm to the defendant, much more than he would have done, if the facts had been truly stated to him. It is very evident, from the whole case, that the defendant knew he was dealing with a man who was wholly unacquainted with the situation and quality of the land in the Illinois lot ; and who relied upon his representation of those facts, to enable him to form a proper estimate of what he could afford to allow for that lot, in part payment of the price he had fixed upon the Le Roy farm. The defendant, therefore, if he knew the facts in relation to the situation and quality of the Illinois lot, and the amount of wood and timber thereon, should have stated them truly. And if he did not know them, so as to be able to state them substantially as they existed, he should have frankly told the complainant so ; in answer to the inquiries which the latter repeatedly made of him. It is true, a purchaser has no right to rely upon the price which a vendor asks for property, or even upon his statement of what it is worth, as evidence of its real value ; but must form his own estimate of the value of the property, after ascertaining the facts upon which its value depends. Still, if the vendor, knowing that the purchaser is unacquainted with the land, makes a false representation as to any matter which, if true, would materially enhance the value of the property, he is in equity bound to make good his representation.

The vice chancellor, however, is right in supposing that this contract ought not to be rescinded in part ; so as to compel the defendant to keep the Le Roy farm at the nominal price put upon it by the parties in this exchange of property, and to allow the complainant to rescind the contract so far as relates to the Illinois lot only, and to recover the whole \$1100 at which that lot was estimated in the agreement for such exchange. Where a party has been defrauded by another in the purchase or sale of property, he may rescind the contract, so as to restore the parties to the same situation they were in when the contract was made ; or he may affirm the contract, so far as it has been af-

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cuted, and claim compensation for the fraud. But it must be a very special case which will authorize the injured party to come into a court of equity to have a contract partially rescinded; and it must be one in which the court can see that no possible injustice will be done by such a course. In the present case, I am satisfied neither of the parties supposed the Illinois lot was worth \$1100 in cash; nor would the complainant have been able to sell the Le Roy farm for the \$4000 at that time, had he not agreed to receive the Illinois lands in exchange, at the rate of \$5 per acre. The witnesses, who reside in the neighborhood of the Illinois lot, do not pretend that if it had corresponded, in all respects, with the defendant's representations, it could have sold for \$5 an acre; or that other lands in that section of country, of the same character and quality which this was represented to be, and which were wholly wild and unimproved, were selling at anything like that price. It would not be equitable, therefore, to rescind the contract as to the Illinois lot only, and to compel the defendant to pay for it at that price; even if the allegation in the bill was true, that the lot was actually worthless and unfit for farming purposes, which is not the fact.

The complainant does not ask to rescind the whole sale; and to take back the Le Roy farm and refund to the defendant the moneys he has paid, with the interest thereon, after deducting therefrom the rents and profits received by the latter. He is only entitled, therefore, to be compensated for the difference between the actual value of the Illinois lot in the state in which it was, in November, 1839, and that value as it would have been, at that time, if the representations of the defendant had been true; with interest on such difference subsequent to that time. And the only remaining question for consideration is, whether the vice chancellor was right in supposing this court had not jurisdiction to give the complainant relief, upon the facts in this case.

The general rule is admitted, that in cases of fraud, a court of equity has jurisdiction, although the party may obtain relief in an action at law. In *Hardwick v. Forbes' adm'r*, (1 *Bibb's Rep.* 212,) the court of appeals in Kentucky decided that where

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a fraud had been committed in the sale of personal chattels, and where the complainant did not seek to set aside the sale in toto, but merely to recover for a rateable deduction in consequence of the fraud or misrepresentation of the defendant, his remedy was at law and not in equity; as the ascertainment of the amount of such deduction belonged properly to a jury. And that decision was confirmed by that court in the subsequent cases of *Cocke v. Hardin*, (*Litt. Sel. Ca.* 374,) and *Blackwell v. Oldham*, (4 *Dana's Rep.* 195.) These decisions appear to be founded in good sense. And I am disposed to follow them so far as to hold that a bill in equity, for the purpose of obtaining a compensation in damages merely, to be paid by the defendant personally, cannot be sustained; where the defendant makes the objection at the proper time, by demurrer or answer, that the complainant has a full and perfect remedy by an action at law against the defendant. It is true, Lord Eldon, in the case of *Evans v. Bicknell*, (6 *Ves. Rep.* 174,) seems to think a court of equity will sustain a bill for the mere purpose of recovering damages for a fraudulent misrepresentation, by the defendant, by which the complainant is deceived and injured in making a contract. His opinion in that case, however, is more than counterbalanced by that of the late Chief Justice Marshall, in *Russell v. Clark's ex'rs*, (7 *Cran. Rep.* 69.) I may add, that the opinion of the late Chief Baron of the exchequer in England, is also in conflict with that of Lord Eldon on this question. In the case of *Newham v. Macy*, (13 *Price's Rep.* 749,) the bill was filed by the purchaser of an estate, to compel the vendor thereof to pay the difference between the actual value of the property sold and the value as it would have been, if the representation of the agent of the vendor, as to the amount of the rental, had not been false. And in reference to the question of jurisdiction, Alexander, C. B. says: "It is not in every case of fraud that relief is to be administered, in a court of equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in a court of equity. The cases of compensation in equity I consider to have grown out of the jurisdiction of the courts of



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equity, as exercised in respect to contracts for the purchase of real property; where it is often ancillary, as incidentally necessary to effectuate decrees of specific performance. This, however, appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages—in effect a mere money demand.”

In the case of *Burrowes v. Lock*, (10 *Ves. Rep.* 471,) Sir Wm. Grant, the master of the rolls, deferred to the opinion of the lord chancellor, in *Evans v. Bicknell*, as he was bound to do. But his decision in that case was right upon another ground. There the complainant was the purchaser of the interest of the defendant Cartwright, in a residuary fund; of which fund Lock, the other defendant, was the trustee under a will. The bill was therefore properly filed against both defendants, to obtain the portion of the trust estate which the vendor had not disposed of or incumbered previous to the sale. It was correct, then, to retain the suit for the purpose of also giving to the complainant full and perfect relief in relation to his whole claim, against the defendants, arising out of that contract; instead of compelling him to bring two suits, one at law and the other in equity therefor. For the same reason, the court of appeals in Virginia very properly sustained a decree, for the refunding of a sum which had been improperly obtained from the complainant, upon a fraudulent concealment of the quantity of the land sold; the bill having been filed not only for the recovery of that amount, which had been overpaid, but also to restrain the collection at law of a much larger sum, for which the complainant had given his bond before the discovery of the fraud. (*Anthony v. Oldacre*, 4 *Call's R.* 489.) So in the case which came before the courts of Tennessee, in 1834, (*Haywood v. Marsh*,) where the fraudulent vendees of property had disposed of a part of it before the fraud was discovered; the court set aside the sale as fraudulent, and revested the title in the complainant as to the part of the land which the defendants retained, and directed a reference to ascertain the damages, which he had sustained by the fraud, in respect to the part of the land which they had sold to other persons before the filing of the bill. Indeed, it may be consid

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ered as a settled principle of this court, in all cases of fraud, that if the party who has been defrauded is entitled to come here for any relief arising out of the contract in which he has been defrauded, and where it is necessary for him to allege and establish the fraud in order to obtain such relief, he may obtain full relief here, without resorting to a suit at law; although as to a part of the relief claimed he had a perfect remedy in an action at law for damages.

I think the case under consideration comes within that principle. Here, the Illinois lands were a part of the consideration to be received in payment for the Le Roy farm, which was conveyed to the defendant. And the vendor has, in all cases upon the sale of real estate, an equitable lien upon the estate sold for the unpaid purchase money, as between him and the vendee, unless there is either an express or implied agreement to waive such lien, although it is otherwise as to personal property. And where, by the fraud of the vendee, a part of the price of the lands sold in fact remains unpaid, although the vendor supposed he had been paid in full at the time, there is no waiver of the equitable lien for the part of the price that actually remains unpaid. Thus, if upon the sale of a farm, the purchaser should pay for the half of it in good money, and for the other half in the worthless bills of a broken and insolvent bank, from which nothing could be obtained, the vendee fraudulently representing such bills to be good and collectable, the vendor would have the right to elect, either to rescind the sale and have a reconveyance of the land, or to charge the land itself with the half of the purchase money which remained unpaid; as an equitable lien upon such land. And a person having an equitable lien upon land for the unpaid purchase money, may come into this court in the first instance, to enforce such lien; without resorting to a suit at law to recover the amount. So in the present case, although the complainant is not entitled to rescind the contract so far as relates to the Illinois lot merely, and is only entitled to the difference in value between the lot as it actually was and what that value would have been if the defendant's representation had been true, the price of the Le Roy farm remained unpaid, at the

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time of filing this bill, to the extent of that difference. The complainant, therefore, had a right to come into this court to enforce such equitable lien against the Le Roy farm ; and as an incident to that relief, this court must ascertain the amount of such lien.

The complainant claims such a lien in his bill. And though he is under a mistake in supposing he is entitled to the whole \$1160 and interest, his general prayer is broad enough to enable the court to give him what he is actually entitled to, upon the case made by his bill and by the evidence in support of the same. The decree appealed from must therefore be reversed with costs. And a decree must be entered, declaring that the representations of the defendant, in relation to the situation and quality of the Illinois lands and as to the wood and timber thereon, as proved in this case, were false and fraudulent as to the complainant ; and that the complainant has an equitable lien upon the Le Roy farm for the amount of the difference in value between the Illinois lot as it was on the 28th of November, 1839, and the value it would have had if those representations had been true ; together with the interest on that amount. If the parties agree upon the amount, the decree will direct the payment thereof, together with the costs of this suit ; and if it is not paid within thirty days, together with the costs of the complainant, that the Le Roy farm, or so much thereof as may be necessary for that purpose, be sold by a master, upon a six weeks notice. But in case the parties cannot agree upon the amount, an issue is to be made up and tried at the circuit in Genesee county, to ascertain the same. The costs of the trial of the issue in that case, as well as the general costs in the cause, and all questions and directions as to the sale of the Le Roy farm to satisfy the amount of the lien, and other questions and directions, are to be reserved until the amount to be paid, including interest up to the time of their verdict, shall have been ascertained by the jury. The depositions in this case, so far as they are applicable, are to be read before the jury ; but with liberty to either party to produce before the jury any other evidence relevant to the question to be decided upon the trial of such issue.

## In the matter of PARKER.

A surrogate has no jurisdiction, to prohibit an executor from contesting the payment of promissory notes, given by the testator, in an action at law brought thereon; or to restrain him from prosecuting a bill of discovery, filed in the court of chancery for the purpose of ascertaining the consideration of such notes.

THIS was an appeal from a decision of the surrogate of the city and county of New-York, rejecting the petition of the appellant, for directions to an executor, in relation to the discharge of his trust. The petitioner was one of the legatees of C. Walker, deceased, to the amount of \$5000, payable out of the personal estate. And the petition stated, in substance, that there was justly due to the mother of the petitioner \$5300, and interest, upon two notes given to her by the testator; that the executor had not filed an inventory of the estate, but had informed the petitioner that if these two notes were to be charged upon the property, the testator's estate would not be sufficient to pay the debts and the general legacies; that the petitioner was willing to have the amount of the two notes paid, but the executor, at the request, and for the benefit of the residuary legatees of the testator, refused to allow the notes as a just claim against the estate, and was proceeding to contest the recovery thereof, in an action at law which had been brought thereon; and that he had also filed a bill of discovery, in the court of chancery, for the purpose of ascertaining the consideration of such notes; and that the expenses of such litigation would be chargeable upon the fund which belonged to the petitioner and others, as general legatees. The petitioner, therefore, prayed for an order of the surrogate directing the executor to desist from the further defence of the action at law upon the notes, and from the further prosecution of the suit in chancery, upon the bill of discovery, and from any further proceedings to resist the claim of the holder and owner of the two notes; until the residuary legatees, for whose benefit that claim was resisted, should give security to indemnify the estate of the testator against the costs and charges of that litigation.

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*T. Sedgwick*, for the appellants.

THE CHANCELLOR. To show that the surrogate had jurisdiction to receive and act upon this petition, and to grant the relief asked for, the appellant's counsel relies upon the provisions of the revised statutes; which, among other things, empower the surrogates to direct and control the conduct of executors and administrators. (2 R. S. 220, § 1, *sub.* 3.) It is difficult to say what direction and control, over executors and administrators, was intended to be given to the surrogates, by the third subdivision of the first section of the title relative to surrogates' courts. But as the concluding clause of that section, as originally enacted, declared in reference to all the powers given by that section, that they should be exercised in the cases and in the manner prescribed in the statutes of this state, and in no other, it is hardly to be presumed that the legislature intended to confer upon a surrogate's court such a power as is claimed by the appellant in this case. It is true, in the amendatory act of 1837, the words *and in no other*, were stricken out of this section; together with the concluding clause, which prohibited a surrogate, under pretext of incidental power or constructive authority, from exercising any jurisdiction whatever, not expressly given by some statute of this state. But I apprehend the effect of that amendment was only to restore to the surrogates the powers which were incidental and necessary to the proper discharge of the powers conferred upon them by statute, or otherwise. The section, as now amended, therefore, gives to the surrogates substantially the same powers as they possessed previous to the adoption of the revised statutes. And I think it would be wrong to construe the general language of this third subdivision, in such a manner as to give to a surrogate a new and extraordinary power, to direct and control the conduct of executors and administrators, relative to suits and proceedings in other courts; which power had never before been exercised by the surrogates, or by the court of probates, in this state, or by the ecclesiastical courts in England.

Again; the exercise of the power sought to be invoked in

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this case, would also lead to a double litigation of the question, whether the notes, claimed by the mother of the petitioner, were in fact just and equitable charges upon the estate of the testator. For, if this petition is entertained, the executor must, of course, be permitted to come in and show, in opposition thereto, that he has reasonable or probable grounds for resisting the claim. And all the other legatees, who have an interest in defeating the claim, if it is unjust or inequitable, will also have the right to come in as interveners to protect their rights; and to show, by evidence or otherwise, that the executor should not be enjoined from making a defence to the action at law upon the notes. For, unless they are allowed to intervene, they will of course have the right to present an original petition to the surrogate, on their part, to direct the executor to resist the claim upon the notes; upon showing that there are reasonable grounds for believing they are not a proper charge upon the fund in which they are interested.

The only proper course, therefore, is to leave it to the executor, under his oath of office faithfully and honestly to discharge the duties of executor; to resist such claims, against the testator's estate, as he conscientiously believes to be unfounded or doubtful, and to admit and allow those which he is satisfied are justly due and ought to be paid. And if he violates his duty in this respect, by subjecting the estate to the expense of a useless litigation, in resisting a claim which he has no reason to believe can be successfully defended, or by admitting and paying a claim which is not a proper charge upon the estate, and which it is his duty to resist, he should not be allowed, in his accounts, for the loss which the estate sustains by such improper conduct.

It appeared by the petition, in this case, that the executor had neglected to file an inventory; and if the petition had asked for an order, upon the executor, that he should file an inventory of the estate which had come to his hands, the surrogate should have received and retained the petition for that purpose. But the relief asked for specifically, was such as the surrogate was not authorized to grant. The order appealed from must therefore be affirmed.

## GARR, adm'r, &amp;c. vs. BRIGHT and others.

There is nothing in the constitution of the United States to deprive the courts of one of the states, of the jurisdiction which they previously possessed, as to suits against a state, brought by citizens of another state, or by citizens or subjects of a foreign state.

The courts of the United States have not even a concurrent jurisdiction with the state courts of chancery, in suits brought by individuals against a state.

The principle upon which the court of chancery assumes jurisdiction, in a suit to which a sovereign state is a party defendant, is not for the purpose of compelling such state to perform any decree which may be made against it; but to enable the state to appear and protect its rights, if it has any, in the suit.

Principles upon which the attorney general is made a party defendant, where the state is interested.

Persons cannot be made parties defendants, in the court of chancery, on the ground of their being the agents of a party interested, where no specific relief is asked against them; and where the bill contains no allegation that they acted as such agents in relation to the transaction in question, or that they had any interest in, or connection with, the subject matter of the litigation.

Although costs, in equity, are in the discretion of the court, except in the case of a complainant's dismissing his own bill, or suffering it to be dismissed for want of prosecution, as a general rule the party succeeding upon the merits is entitled to costs.

In general, where the bill is dismissed upon a general demurrer thereto, for want of equity, the defendant is entitled to costs.

The provisions of the revised statutes in relation to costs, at law, in actions brought by executors and administrators, do not apply to suits in the court of chancery.

The principle, that costs in equity are in the discretion of the court, applies to suits brought by executors or administrators, in the court of chancery, as well as to suits brought by other persons. And *it seems*, the rule is the same at law; in cases where the costs are not regulated by statute.

Where a bill is filed by an executor or administrator, which bill, upon its face, is not sustainable, that is, where the matter in dispute does not depend upon a question of fact but of law, and where such suit is brought against a stranger to the estate of the decedent, and not for the mere purpose of obtaining the direction of the court as to the manner in which the complainant shall execute his trust, or to settle the conflicting claims of the several persons interested in the estate, the general rules of the court relative to costs in suits brought by other persons will be applied.

THIS was an appeal from a decretal order of the vice chancellor of the first circuit, allowing the demurrer of the defen-

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dants, Bright & Palmer; and dismissing the complainant's bill, as to them, with costs. The bill was filed by the complainant, as the administrator of Colin Mitchell, deceased, against the trustees of The Apalachicola Land Company, and the receivers of The Morris Canal and Banking Company; to establish the complainant's claim to four hundred and seventy three shares of the stock of the Apalachicola Land Company, and to obtain a transfer to him of the said stock, or to compel the trustees to give to him new certificates for the same; or that the complainant might be permitted to redeem the said stock, if the hypothecation thereof to the Morris Canal and Banking Company should be declared to have been legal and valid. The respondents, Bright & Palmer, who were described in the prayer for the subpœna and injunction, as agents of the state of Indiana, were also made defendants. But no specific relief was asked against them; nor was there any allegation in the bill that they were agents of the state of Indiana, in relation to the stock in question, or that they had any interest in, or connection with the subject matter of the litigation. The allegations in the bill were substantially as follows: In November, 1835, Mitchell, Vermilyea, and others, who were the proprietors of about twelve hundred thousand acres of Florida lands, agreed to convert them into a transferrible stock, consisting of shares of 500 acres each; and to form an association, of the holders and assignees of such shares, by the name of the Apalachicola Land Company. The association was formed accordingly, and the proprietors of the land conveyed the same to Louis McLane and others, as trustees, in trust, to sell the land and to divide the proceeds thereof among the several stockholders of the association, or their assigns, in proportion to their several shares in such stock. Mitchell had contracted with Vermilyea, to purchase of him a large number of shares in the stock of the association, to be paid for in the bonds of the Morris Canal and Banking Company, payable in four equal annual instalments, with interest at the rate of five per cent per annum, to be paid semi-annually. And to enable Mitchell to fulfil that contract, he applied to the Morris Canal and Banking Company, who agreed to loan him



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their bond for \$142,000, payable to him or his assigns, dated in March, 1836, and payable in two, three, four and five years, in equal instalments, with semi-annual interest, at the rate of five per cent per annum. For which he was to give his four bonds of the same date, to Louis McLane, as the trustee for the Morris Canal and Banking Company, and for the same amount, payable in two, three, four, and five years, with interest thereon semi-annually, at the rate of seven per cent per annum. And to secure the payment of the said four bonds, Mitchell was to make an absolute transfer to the Morris Canal and Banking Company, of four hundred and seventy-three shares, and a fraction, of the stock of the Apalachicola Land Company, upon the books of that association. This arrangement was carried into effect; except that the Morris Canal and Banking Company substituted their four bonds instead of one, for the \$142,000. Mitchell was lost, at sea, in the summer of 1837, and no one administered upon his property here until about seven years afterwards. In December, 1837, McLane assigned the bonds of Mitchell to the Morris Canal and Banking Company. About two years afterwards, that company transferred the four hundred and seventy-three shares of Apalachicola Land Company stock, so pledged for the payment of Mitchell's bonds, to the president of the State Bank of Indiana, in payment of a debt due from the Morris Canal and Banking Company to the state of Indiana; and he subsequently transferred them to that state. The complainant insisted, in his bill, that if the transaction between Mitchell and the Morris Canal and Banking Company was to be considered as having taken place in the state of New-Jersey, where that company was incorporated, the bonds of Mitchell, and the agreement upon which the transaction was founded, were void on the ground of usury, the legal rate of interest in New-Jersey being but six per cent; and that if it should be considered a New-York transaction, it was a violation of the restraining law of this state, and also a violation of the charter of the company. The respondents put in a general demurrer to the bill for want of equity; and also upon the ground that the heirs at law of Mitchell were not made parties. And upon

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the argument of the demurrer, the objection was also made, *ortenus*, that the state of Indiana was a necessary party.

*W. C. Noyes*, for appellant. As to the questions arising upon the demurrer.

I. The state of Indiana could not be made a party defendant. Where a state is made defendant, the state courts cannot exercise jurisdiction. A sovereign state is only sueable by virtue of the express compact to submit itself to the federal courts. (*Per Bronson, J. in Delafield v. State of Illinois, in court of errors, 2 Hill, 169. See also 1 Kent's Com. 297, note (c).*)

II. The state of Indiana being out of the jurisdiction of the court, that is a sufficient reason for its not being made a party. When a person, who ought to be made a party, is out of the jurisdiction of the court, that fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is, in most cases, a sufficient reason for not bringing him before the court; and the court will proceed without him against the other parties, as far as circumstances will permit. (*Mitford, 4th ed. 164. Att'y Gen'l, ex rel. University of Glasgow, v. Baliol College and others, Mitford, 3d ed. 25, note (g); 4th ed. 32, note (u). See Story's Eq. Pl. §§ 78, 87. Calvert on Parties, 64.*) If a party, who might otherwise be considered as material, by being made a party to the bill, would, from the limited nature of its (the court's) authority, oust the court of its jurisdiction, I should strain hard to give relief as between the parties before the court. (*Per Story, J. in West v. Randall, 2 Mason, 196.*)

III. The state of Indiana was virtually represented in the suit by its agents, Bright and Palmer. When the claimant of any particular interest is substantially represented, his absence is excused. (*Calvert on Parties, 58. See Story's Eq. Pl. § 142 et seq. Id. 222.*)

IV. Bright and Palmer were properly made parties, inasmuch as the bill prayed that they might be restrained by injunction from transferring the stock in question as agents of the state.

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Persons against whom an injunction is prayed, are necessary parties. (*Calvert on Parties*, 90.)

V. The complainant should have been allowed to amend without paying the costs of the demurrer, because, 1. His error, (if it was one) of not making the state a party, is excusable on account of the uncertainty of the law on that subject, and the opinion expressed by Mr. Justice Bronson, in 2 *Hill*, 169. 2. The objection was not stated in the demurrer, but was taken *ore tenus*. If it had been pointed out by the demurrer, the complainant would perhaps have amended under the 44th rule. (See *Garlick v. Strong*, 3 *Paige*, 440. *Story's Eq. Pl.* §§ 464, 541.) 3. Because the complainant sues in *auter droit*. Though the general rule is, that there can be no appeal upon the question of costs; yet if a party appeals, having a substantial ground of appeal, and brings in the question of costs along with it, he may proceed with respect to the question of costs, though he does not succeed on the substantial ground of appeal. (1 *Barbour's Ch. Pr.* 376.)

VI. The order for the dismissal of the bill should have reserved the right to the complainant to amend. It should have been to dismiss, unless the complainant should amend, &c. and not have merely given leave to amend. (*Story's Eq. Pl.* § 541.) This distinction is important, as the vice chancellor, in denying the motion, subsequently made, for leave to amend in that and other particulars, founded his opinion upon the form of the order.

VII. The order allowing the demurrer should not have given costs against the complainant, who sued in *auter droit*. A plaintiff, suing in *auter droit*, is not responsible for costs, unless under special circumstances. (*Goodrich v. Pendleton*, 3 *John. Ch. R.* 520.) In general, an executor or administrator who brings a suit in this court in good faith, on a probable ground of right, will not be charged with costs. (See also 4 *Hill*, 57. *Manny v. Philips*, 1 *Paige*, 472.)

The appeal from the order denying the motion is well taken for the following reasons:

I. The vice chancellor should have granted the motion, and

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permitted the complainant to make the amendments that he asked for. Whether the amendments proposed would entirely remove all cause of demurrer, was a question that did not properly arise upon the motion, and ought not to have been prejudged. The reason assigned by the vice chancellor, that the laws of Florida, to which the complainant in his first proposed amendment, refers, should have been set out, is founded upon the assumption that those laws are statute laws; which is not alleged in the amendment, and is not the fact.

II. The vice chancellor should, at the least, have granted the motion in part, by giving leave to make the state of Indiana a party. It is no answer to this point, that leave was already given in the order made, on the allowance of Bright and Palmer's demurrer. The order applied only as to them, and not as to the other defendants.

*L. Hoyt*, for respondents.

I. The bill does not show any equities, in favor of the complainant, against any of the defendants.

II. The bill shows no equities in favor of the estate of Colin Mitchell.

III. The bonds of Colin Mitchell were made in the city of New-York. Reserving seven per cent interest, was therefore not usury.

IV. But if they are to be considered as having been made in New-Jersey, and they reserve a greater interest than is allowed by the law of that state, then the law is not set forth with sufficient particularity to entitle complainant to refer to or prove it.

V. By the law of New-Jersey, a party coming into a court of equity for relief must do equity. And by the law of this state, as it existed when the transactions stated in the bill took place, (1836,) a party could not compel a discovery of the usury, by the oath of the defendant, unless he should do equity by bringing into court the money, or the security, that he had received from the defendants by reason of the alleged usurious transaction. (*Miller v. Ford*, Sax. Ch. Rep. 358. *Livingston v Harris*, 3 Paige, 528. *Cole v. Savage*, 10 Id. 583.)

VI. The transaction stated in the bill is not within the object

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or letter of the statute, known as the "restraining act." 1. It is entirely disconnected with the ordinary business of banking, and the keeping of an office of discount and deposit; which was what the statute intended to restrain; and 2. Taking the bonds of Mitchell was not a discounting of notes; and the issuing the bonds of the Morris Canal was not an issuing of notes, or other evidence of debt, intended to circulate as money. 3. If the transaction was a violation of the restraining law, there is nothing in the bill calling for the aid, or authorizing the interference, of a court of equity; a court of law having all the power necessary to punish such violation.

VII. Whatever violation of the law there was, Colin Mitchell was a party to; and his representatives cannot come into a court of equity to be relieved against its consequences. (*De Groot v. Van Duzer*, 20 *Wend.* 393.)

VIII. No such interest is shown in the defendants, Bright and Palmer, as authorized the complainants to make them parties defendants.

IX. The state of Indiana, the real party in interest, is not before the court.

THE CHANCELLOR. It is not necessary, upon this appeal, to examine the question at length as to the right of the complainant, in such a suit as this, to make the state of Indiana a party defendant. No question on this subject arises under the constitution of the United States. The eleventh article of the amendments to that constitution, declares that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state. The courts of the United States have not, therefore, even a concurrent jurisdiction in such a case. And there is nothing in that constitution to deprive the court of chancery of this state, of all the jurisdiction on the subject which it possessed before that constitution was adopted. It is true this court has not the power, absolutely, to compel a sovereign state to perform a decree, which may be made against

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such state. And if the state of Indiana should be made a party defendant in this suit, it would not be with any expectation of compelling it to transfer to the complainant the stock standing in its name upon the books of the Apalachicola Land Company. But it would be to enable the state to appear and protect its right, if it has any, as one of the *cestuis que trust*, in the proceeds of the lands of that association; which lands are vested in some of the other defendants in this suit as trustees for the stockholders; so that such trustees may be protected from the risk and expense of a double litigation, with those who have conflicting claims upon the trust fund. And, upon the same principle, the attorney general would be made a party to the suit, if the people of this state claimed an interest as one of the *cestuis que trust*, and the complainant was asking similar relief against the trustees, as the claimant of the same interest; although the state itself cannot be sued in its own courts, directly. It is also the ordinary practice to make the attorney general a party to a foreclosure suit, where the people of this state have a subsequent lien upon the mortgaged premises, by judgment or otherwise; so as to give to the purchaser, under the decree of foreclosure, a perfect title to the premises; discharged of the lien of the state. And where any other state or government has a similar lien, I see no valid objection to making it a party defendant, for the same purpose.

But even if the state of Indiana could not have been made a party defendant in the present suit, it does not follow that the complainant had the right to make Bright & Palmer defendants, as the mere agents of the state; especially when it was not pretended that the stock claimed by him was standing in their names, or that they were charged with any special duty in relation to such stock, by the laws of the state of Indiana, or otherwise. The demurrer of the appellants was therefore properly allowed by the vice chancellor. Not upon the objection made *ore tenus*, that the state of Indiana was a necessary party to the suit, for that was a matter to be urged by the other defendants, if by any one, but upon the ground that these two defendants were not proper parties. In other words, there was no equity

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in the bill, so far as they were concerned. The amendments asked for by the complainant, therefore, could not have removed the objection as to them. And the order of the vice chancellor was right, in directing an absolute dismissal of the bill, so far as they were concerned.

The only remaining question is, whether the decretal order of the vice chancellor was right as to costs. Although the costs are in the discretion of the court, in suits in equity, except in the case of a complainant's dismissing his own bill, or suffering it to be dismissed for want of prosecution, as a general rule, the party succeeding upon the merits is entitled to costs. And this is almost uniformly the case where the bill is dismissed upon a general demurrer thereto, for want of equity. For the complainant, by one of Lord Bacon's orders, was to be charged with costs in all cases, where it should appear, upon the hearing, that he had not probable cause for instituting the suit. And a complainant can hardly be said to have probable cause for making a person a defendant, in a chancery suit, when upon the face of the bill it is evident the complainant had no equitable claim whatever against such party; and had no right to make him a defendant in the suit, for any purpose.

The statutory provisions in relation to costs in actions at law, brought by executors and administrators as such, do not apply to suits in this court. The principle, therefore, that costs in equity, are in the discretion of the court, applies to suits brought by executors or administrators in this court, as well as to suits brought by other persons. Indeed, the rule is the same at law, in cases where the costs are not regulated by statute. And, therefore, where an administrator had probable cause for bringing an action against an heir for a bond debt of the ancestor, to the plaintiff's intestate, but subsequently discovered that the estate had been conveyed, he was permitted to discontinue his action without costs; upon condition that he should not bring another suit without leave of the court. (*Burnet, adm'r, v. Cook*, 4 Bur. Rep. 1927.) But the same court, in a previous case, where no such ground of excuse appeared, refused to permit an executor to discontinue without costs. (*Harris, ex'r, v.*

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*Jones, 4 Idem, 1451.*) And in the case of *Haydon v. Norton*, (*Conke's Ca. of Pr. 79*,) where an executor brought a bill against a member of parliament, which was demurred to, and the plaintiff thereupon moved for leave to discontinue, it was debated whether he, being an executor, should pay costs on such discontinuance; and it was decided that the costs must be paid, it being the fault of the executor himself.

Where a bill is filed, by an executor or administrator, which bill upon its face is not sustainable, that is, where the matter in dispute does not depend upon a question of fact, but one of law, and consequently which is as much within the knowledge of the complainant as of his testator or intestate, and such suit is brought against a stranger to the estate, and not for the mere purpose of obtaining the direction of the court, as to the manner of the complainant's executing his trust, or to settle the conflicting claims of the several persons interested in the estate, I see no good reason for departing from the general rule of this court relative to costs in suits brought by other persons. And in the case of *Frazer v. Moore*, in 1720, (*Bunb. Rep. 63, and 4 Burn. Eccl. Law, 320, S. C.*,) the court of exchequer acted upon that principle, and required the administrator to pay costs upon the allowance of a demurrer to his bill. The court also said, in that case, that such was the constant course in equity. Certainly the exemption from liability for costs, by executors or administrators, suing in this court in behalf of their testators or intestates, ought not to extend to cases where the want of equity as against a party who has been improperly made a defendant in the suit, is so palpable that counsel of ordinary intelligence could not reasonably have supposed such suit would eventually be sustained against such defendant. And such appears to be this case, so far as relates to the defendants Bright & Palmer; as to whom there does not appear to be a single allegation in the complainant's bill, showing that they are in any way connected with the subject matter of this suit, or that they have any power or authority to interfere with the stock standing in the name of the state of Indiana, upon the books of The Apalachicola Land Company. It is not even stated that they, or



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either of them, are the general or special agents of the state of Indiana, in relation to that stock, or as to any other matter. All that appears on the subject, is in the prayers for process ; where Bright & Palmer are called the agents of the state of Indiana. But even there, the nature and object of such agency, or to what subject it relates, is not specified. The bill, therefore, did not furnish a plausible pretence for making the respondents parties to this suit ; even if it would have been proper to make a general agent of the state of Indiana, having the control of this stock, a party, upon the ground that the state itself could not be reached, because it was not within the jurisdiction of this court, so as to be amenable to its process.

The decretal orders appealed from must, therefore, be affirmed, with costs.

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 CHRISTIE and wife vs. BOGARDUS and others.

An *ex parte* injunction ought not to be granted, to restrain a party from proceeding under a judgment and execution at law, which judgment is alleged to have been paid ; where the complainant does not know, and cannot state as a fact within his knowledge, that the judgment has been paid, or that the defendant claims to sell, under the execution, for more than is justly due.

The statute is imperative, that no injunction shall issue to stay proceedings at law in any personal action, after judgment, unless a sum of money equal to the judgment and costs is paid into court, and a bond is also given for the payment of the costs and damages which may be awarded to the defendant in the suit in the court of chancery.

But the chancellor or vice chancellor before whom the bill is filed has the power to dispense with the actual deposit of the amount of the judgment and costs, upon sufficient cause shown ; and may take a bond with sureties for the payment of the judgment.

Even in that case, however, the complainant must give another bond for the payment of the damages and costs which may be awarded in the court of chancery. Or the penalty and condition of the first mentioned bond must be enlarged, so as to conform to that requirement of the statute also.

In no case can an *ex parte* injunction be issued, to stay the plaintiff in a judgment, from proceeding against the judgment debtor or his property, without an actual

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deposit of the amount claimed to be due, and giving a bond with sureties for damages and costs; or the giving of proper security for the payment of the judgment, and also for the damages and costs which may be awarded in the court of chancery. Where the whole or a part of a judgment has been paid, and the plaintiff therein is proceeding to collect the whole judgment, or a part thereof which has been paid, the proper remedy of the defendant is by a summary application to the court in which the judgment was recovered. Or, if it is proper for him to come into the court of chancery, to stay the proceedings upon the judgment, he should state the fact of such payment, in his bill, and swear to it; and give notice of his application, for an injunction, to the adverse party.

Upon such an application, to authorize the court to dispense with any part of the deposit, or the giving of security in lieu thereof, such court must be satisfied that the part of the amount of the original judgment as to which the security or deposit is to be dispensed with, is actually paid and satisfied. It will not be sufficient if it is merely *doubtful* whether the whole amount claimed is justly due upon the judgment.

The complainant, when he seeks to obtain an injunction to stay the collection of a judgment, without a deposit or security, must state the times, circumstances, and amount of each payment; so as to enable the court, by mere computation, to fix the amount of the deposit, or of the bond, and to enable the defendant to controvert the fact of such payments having been made.

A bond for the damages and costs, which may be awarded against the complainant, can in no case be dispensed with, upon the granting of a preliminary injunction to stay proceedings at law upon a judgment; although such injunction is granted upon a special application to the court, and upon the hearing of the defendant.

THIS was an application, on the part of the defendants, to set aside an injunction, which had been issued in this cause, for irregularity; or for such other relief as they were entitled to in the premises. The motion was founded upon the bill of complaint, and affidavits, which showed the following state of facts. In 1840 the complainant J. D. Christie, and S. T. Todd, who was not a party to this suit, were indebted to the Bank of Ithaca about \$8500; for which debt all the defendants in this suit were holden as their sureties. Christie was also indebted to the bank in the further sum of \$1340; for which two of the defendants, Labar and Love, were liable as his sureties. He was also indebted to A. Dana about \$800, for which all the defendants were holden as sureties. Christie and Todd, together with the defendants, gave a bond and warrant to the bank, for the amount of the first of these debts, on the 8th of April, 1840. On the same day Christie, and the defendants Labar and Love, gave a

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separate bond and warrant to the bank, for the debt for which they were alone liable. And at the same time Christie and all the defendants gave the bond and warrant to Dana, for the debt due to him. On the same day, Christie gave his bond and warrant to the defendants, for the aggregate amount of these three debts; amounting in the whole to the sum of \$10,691,18. Judgments were entered, in the supreme court, upon these bonds and warrants respectively, on the 14th of the same month. And on the 25th of May, 1845, an execution was issued upon the judgment in favor of the defendants in this suit, against Christie, to the sheriff of Tompkins county; with directions to levy the amount of the debt and costs.

At the time of the giving of these judgments, the defendants Bogardus, Labar and Love, held certain securities by way of mortgage, from Christie, to secure them in part for their liabilities for him. And some other interests in real estate were subsequently conveyed to them, by Christie, which the bill alleged were received as security for the same debt. In May, 1841, the complainant Christie, with two other persons as his sureties, who were not made parties to this suit, gave another judgment to the Bank of Ithaca; as a further security for the debts due to it. The bill, after stating these facts, and that the defendants had taken possession of some of the lands conveyed to them by way of mortgage, alleged, upon the belief of the complainants, that the debts to the bank and to Dana had been paid by the defendants and by Christie, chiefly by them out of his effects, *and otherwise*, as his sureties; but that the several judgments were still unsatisfied of record. It was also stated that the defendants had recently directed the sheriff to proceed upon the execution, issued on their judgment in 1840, and to sell certain lands belonging to the complainant J. D. Christie, and other lands belonging to his wife, in which he had a life interest by the marriage; and that the sheriff had advertised such lands for sale. The complainants also stated that they feared the defendants would cause executions to be issued upon the several judgments, in favor of the bank, and of Dana. The bill also charged that the defendants had received, from time to time, large sums of money

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towards and on account of their liabilities for the complainant, and in property and the proceeds of property, and in choses in action assigned to them by Christie, and in rents and profits of real estate conveyed to them by way of mortgage, and in the proceeds of property sold under execution; and in other modes which the complainants did not deem it necessary for them to specify. The complainants thereupon insisted and charged the truth to be, according to their *judgment and belief*, that the liabilities of the defendants were fully paid off and satisfied. They therefore prayed that an account might be taken of the liabilities of the defendants, and of the amounts which they had received, or which they were equitably chargeable with, towards the payment and extinguishment of such liabilities; so that the complainants might know the exact balance due from Christie, if any; he offering to pay such balance as might be found due upon such accounting; and that the mortgages and other securities might be delivered up and cancelled, and the several judgments satisfied of record.

Upon this bill the complainant Christie applied to one of the vice chancellors, acting as an injunction master, and without the deposit of any money or giving any security except his own bond, in the penalty of \$500, obtained an injunction; restraining the defendants from selling under the execution, upon their judgment, or from taking any proceedings whatever under any execution upon either of the judgments mentioned in the bill.

*G. F. Comstock*, for the complainants.

*Ben Johnson*, for the defendants.

THE CHANCELLOR. It is evident, from this bill, that the complainants did not know, and could not state as a fact within their own knowledge, that the judgment of the defendants was fully paid; or that the defendants were in fact claiming to sell, under their execution, for any thing more than was justly due. An *ex parte* injunction, therefore, ought not to have been granted in this case; even if there had been

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no statutory provision regulating the granting of injunctions to stay proceedings at law after judgment. But a notice of the application should have been given, so as to afford the defendants an opportunity to be heard. (*Campbell v. Morrison*, 7 *Paige's Rep.* 157.) The injunction in the present case then should be dissolved with costs, upon the matter of the bill only even if the vice chancellor had been authorized to allow an injunction to stay the proceedings in a suit at law after judgment, without the payment of the money into court.

I am also satisfied that, in the present case, the injunction was irregularly issued, and that the vice chancellor had no authority to allow the injunction without requiring the amount claimed by the defendants as due upon their judgment to be paid into court; and also taking a bond, with sureties, as required by law. The statute is imperative, that no injunction shall issue to stay proceedings at law in any personal action after judgment, unless a sum of money equal to the amount of the judgment and costs is paid into court, and a bond also given for the payment of the costs and damages which may be awarded to the defendant, in the suit in this court. (2 *R. S.* 189, § 147.) It is true the chancellor or vice chancellor, before whom the bill is filed, has power to dispense with the actual deposit of the money, upon any sufficient cause shown to take the case out of the general rule; and to take a bond with sureties, for the payment of the judgment. But even in that case the complainant must give another bond, for the payment of the damages and costs which may be awarded in this court; or the penalty and condition of the first mentioned bond must be enlarged, so as to conform to that requirement of the statute also. In no case, therefore, can an ex parte injunction be issued, to stay the plaintiff in a judgment from proceeding against the judgment debtor, or his property which is liable to execution, without an actual deposit of the amount claimed to be due, and giving the bond with sureties for damages and costs; or the giving of proper security for the payment of the judgment, and also for the damages and costs which may be awarded here.

The defendant in the judgment is not without remedy, how-

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ever, where the whole or a part of the judgment has been actually paid, if the plaintiff still insists upon proceeding to collect the whole judgment, or any part thereof which has been thus paid. The proper course, in an ordinary case, is to make a summary application to the court in which the judgment was recovered, for relief. Or, if the circumstances are such as to render it proper for the defendant to come into this court, to stay the proceedings upon the judgment, he should state the fact of such payment in his bill, and swear to it, and give notice of his application to the adverse party. Then this court, after hearing the parties upon that application, will be in a situation to decide whether the whole amount of the judgment, or only a part of it, should be paid into court, in order to comply with the spirit and intent of the statute on this subject ; or for what amount a bond with sureties should be given, if the circumstances are such as to render it proper for the court to dispense with the actual payment of the money. But upon such a hearing the court would not be authorized to grant an injunction, to stay the proceedings upon the judgment, without an actual deposit of the money, or the giving of security to the full amount of the judgment, and interest thereon, or the amount claimed to be due and unpaid, merely because it was rendered doubtful whether the whole amount so claimed was justly due. To dispense with any part of the deposit, or the giving of security in lieu thereof, the court must be satisfied, beyond any reasonable doubt, that the part of the amount of the original judgment, as to which neither security or deposit is required, is actually paid and satisfied. And for that purpose it is not sufficient, for the complainant to state generally, as in this case, that the judgment has been paid by his money and property, or by sales under execution. But the party who seeks to be excused from depositing the money, or giving security, for the whole amount claimed by the adverse party to be due, must state the time, circumstances and amount of each payment, so as to enable the court, by mere computation, to fix the amount of the deposit, or of the bond ; and to give the party who is sought to be enjoined an opportunity to meet and deny the fact of such payments, if they have not been actually

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made as charged in the bill. And a bond for the damages and costs, which may be awarded against the complainant here, can in no case be dispensed with, upon the granting of a preliminary injunction to stay proceedings at law upon a judgment; although such injunction is granted upon a special application to the court, and upon the hearing of the party against whom the injunction is sought.

As the injunction which was issued in this case was irregularly as well as erroneously granted, it must be set aside with costs.

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WINSHIP and wife vs. JEWETT and HESS.

The general affidavit of a defendant, that he has stated his case truly to his counsel, and that he is advised by such counsel, and believes, that he has a good and substantial defence upon the merits, is not sufficient to authorize the court of chancery to set aside a regular default or decree. But the party who wishes to obtain relief of that kind here, on the ground that he has a meritorious defence, must state the substance of such defence, in the affidavit on which his application is founded, or must show the facts, upon oath, in some other form; so that the court may see what the alleged defence is, and be able to form an opinion, whether the defendant has a meritorious, or only a mere technical, defence; or whether he has any defence whatever to the suit.

The fact that arbitrators were not sworn, merely constitutes a technical defence, if it is any defence, to a bill filed to enforce the performance of their award; and the court of chancery will not open a regular order to close the proofs, and a decree founded thereon, for the purpose of allowing the defendant to prove such a defence. The fact that arbitrators have made an erroneous decision does not render their award invalid. But the award, if made in good faith, is conclusive upon the parties; and neither party will be permitted to prove that the arbitrators decided wrong, either as to the law or the facts of the case.

It is no defence to a bill to enforce the performance of an award, that after the award had been concurred in by all the arbitrators, and published, one of them dissented therefrom.

*It seems* that an omission to have arbitrators sworn does not render their award invalid, where no objection is made previous to the making of such award.

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THIS was an appeal, by the complainants, from an order of the vice chancellor of the second circuit. The bill was filed to compel the specific performance of an award of arbitrators, for the partition of land. On the 17th of July, 1840, Eliza Hunt, then the widow of R. L. Hunt, deceased, but who, subsequently to the award, became the wife of D. Winship, conveyed to the defendants, for the consideration of five dollars, two undivided third parts of the real estate of which her late husband had died seized, and which she claimed under his will; reserving to herself the other third. On the same day the defendants executed to her an instrument which recited the making of that conveyance, and that the real estate embraced therein consisted of a farm of land in Westchester county, containing, by estimation, 300 acres; which instrument contained certain stipulations, on the part of the defendants, to pay the debts of her deceased husband, or the part of them specified in such instrument. By a further agreement, executed at the same time, under her and their respective hands and seals, and annexed to the last mentioned instrument, and referring to the same, it was mutually agreed that if they should not, within twenty days, make an amicable partition, between her, of the one part, and Jewett and Hess, of the other part, and execute mutual releases, that then W. Jay, A. Vark, and A. J. Constant, were, by such agreement, authorized to make such partition. And, in making the partition, the arbitrators were to take into consideration the relative value, as well as the quantity, of land to be allotted to the parties. It was also agreed that the partition made by the arbitrators, or any two of them, should be binding, and that the parties should carry the same into effect by executing mutual releases. The parties did not agree upon a partition between themselves, within the time specified. And in November thereafter they called upon the arbitrators to make such partition, under the agreement. The arbitrators thereupon met and examined the farm, and the several parts thereof, and made a partition of such farm pursuant to the submission, by a written award under their hands and seals, in duplicate; one part of which award was delivered to each party. The award described the part of the premises set off to the



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widow, by a reference to a map of the farm, made by A. Finlay, and the numbers of the lots; and awarded the residue, not thus set off to her, to the defendants. By the will of R. L. Hunt's father, under which he held the farm at the time of his death, the sisters of the devisee, while they remained unmarried, were entitled to the use of a certain part of the dwelling house upon that part of the premises which, in the partition, was set off to Mrs. Hunt; and to certain privileges in the garden and cellar. And as two of those sisters remained unmarried, the arbitrators took that charge into consideration in making the partition; and stated in their award, that in consequence of that charge they had set off more land to the widow than it would otherwise have been equitable to set off to her. After the making of the award the defendants refused to carry the partition into effect, or to execute a release, according to the terms of the submission. And the bill in this cause was thereupon filed, by Winship and his wife, to compel a specific performance of the agreement.

The defendants employed J. W. Tompkins as their solicitor to defend the suit; and they put in their answer, which was not sworn to, an answer on oath being waived by the complainants. In this answer the defendants admitted, that on the 17th of July, 1840, the parties were seised of the premises, as tenants in common, as stated in the bill. They also admitted the execution of the agreement as to the partition, which was signed by all of the parties; setting it out at length, but without setting out the instrument of the same date, to which it was annexed, or making any reference whatever to that instrument in their answer. And they then insisted, that by virtue of that submission the arbitrators were not authorized to make partition of the farm; because the submission did not describe any land, nor state in what proportions the parties to the submission were entitled. They also alleged, in their answer, that the arbitrators were not sworn, that they examined witnesses without oath, and in private; and setting up many other objections to the conduct of the arbitrators. The answer also stated that the arbitrators awarded to the widow about one half of the farm in value, that in making such an unequal and unjust partition the arbitrators had acted on

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the erroneous impression, that the defendants had offered, or agreed to, such a partition ; and that the defendants objected to the award immediately after it was delivered to the parties, and that one of the arbitrators, who had signed the same, thereupon dissented. They further objected to the award upon the ground that it was not witnessed, proved, or acknowledged ; and they also stated in their answer, that subsequent to the submission, and even after the award, Mrs. Hunt, and she and her husband since her marriage, had used, possessed and occupied the greater part of the farm, and had cut wood on the same, &c. of which they claimed an account. A replication was thereupon filed. And the complainant's solicitor, after waiting nearly a year, entered an order to produce witnesses ; and served the same, and notice of examining witnesses on his part, and proceeded to take proofs. About three months thereafter he entered an order to close the proofs, and served the same on the defendants' solicitor. And at the expiration of about eight months from that time he noticed the cause for hearing, for February term, 1845. He then obtained a decree for the specific performance of the agreement, to carry into effect the partition and award, and that the parties should execute mutual releases and conveyances accordingly, with costs ; and referring it to a master to settle the form of such releases and conveyances ; and also referring it to the master to inquire and report what damages the complainants had sustained by the neglect of the defendants to perform the agreement to carry the partition into effect ; and directing the payment of such damages by the defendants, upon the coming in and confirmation of the master's report. The defendants' solicitor was thereupon summoned to attend the master, upon the reference, to settle the forms of the conveyances to be executed by the parties. He then obtained an order to stay the proceedings, and gave notice of an application before the vice chancellor, for the first Monday of March, to open the decree taken by default of the defendants at the hearing, and that they might have liberty to argue their cause. Upon the hearing of that application, the pleadings and proofs in the cause, as well as the papers upon which the motion was founded, were read and commented on by the counsel for

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both parties; after which the vice chancellor denied the application, except that he directed that nothing in the decree should be so construed as to deprive the defendants of any rights they might have against the complainants for the rents, issues and profits received by them, or for waste committed upon the premises. The complainants' solicitor thereupon served the order denying the application, and took out and served a new summons to attend before the master. And he was proceeding to obtain an attachment against the defendants, for not executing the release settled by the master, when he received notice of another order to stay proceedings, and notice of a new application to the vice chancellor for an order vacating the decree, and the order to close the proofs, and to give the defendants time to examine their witnesses.

This application was founded upon an affidavit of Jewett, that he had stated his case to his counsel and believed he had a good defence upon the merits. And on an affidavit of the defendant Hess, that his solicitor did not give him any notice of the examination of the complainant's witness, and did not himself attend the examination; that it was well understood between him and his solicitor that the defendants were to examine certain witnesses to establish their defence, and among others W. Jay, one of the arbitrators; that his solicitor was to give him notice when the proper time arrived; that he had never received any notice whatever from his solicitor, on the subject of the suit, and did not see him until the 5th of April, 1845, and had no information that the proofs had been closed or the cause brought to argument until that time; that the bill was filed to carry into effect an award which the deponents *claimed* was invalid and inoperative, among other things, *by reason of the arbitrators having misapprehended the force and effect of the submission, and having proceeded upon erroneous principles in making the award, and under a mistake as to the material facts and circumstances*; by which great injustice had been done to the defendants, and by which they were wrongfully deprived of property to the amount of \$5000, if the decree should be enforced; that as he was advised by counsel, and believed, the defendants had a good and

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substantial defence on the merits ; and that such defence had been defeated by the neglect of their solicitor, and would be unavailing unless the decree and the order to close the proofs should be vacated ; and that any remedy they might have against their solicitor, for his neglect, would be doubtful, difficult and inadequate. There was also a further affidavit of Jewett, that he had heard the affidavit of Hess read, and believed the same to be true ; that after putting in his answer he left the defence to the management of his co-defendant Hess, and that he had not seen or heard from his solicitor since the order to produce witnesses was entered ; that his said solicitor advised them, before putting in their answer, that they had a good defence ; and told him he should be notified when the witnesses were to be examined. Affidavits were read in opposition to the application, showing the great delay and expense to which the complainants had been subjected by the adverse parties ; and which affidavits also showed that the solicitor for the defendants was perfectly responsible, for any amount which might be recovered against him by them for his supposed negligence. The vice chancellor, upon the hearing of that application, made an order vacating the decree and setting aside the order to close the proofs ; and directing that either party be at liberty, within forty days, to examine such witnesses as they might deem proper, upon the usual notice, and that the defendants be at liberty to cross-examine the witnesses already examined. From this order the complainants appealed to the chancellor.

*W. Silliman*, for appellants. I. The affidavits of the defendants, on which their application was made, are grossly defective. 1. They do not set forth the nature of their defence nor in what it consists, and do not disclose any of the facts on which their supposed defence rests ; hence they amount merely to an affidavit of merits. 2. The answer not being on oath, the defendants in their affidavits should have stated such portions of it as they would swear to be true ; but they have not even alleged the answer to be true. 3. The affidavits should state the names of their witnesses, and especially what facts they can prove by

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such witnesses. An affidavit of a defendant in a suit in chancery that he has a good defence, without stating the nature and substance of such defence, is not sufficient. (*Sea Ins. Co. v. Stebbins*, 8 *Paige*, 565.) It is the settled practice of this court to require the party, in an affidavit of merits, to state what such merits are. (*Meach v. Chappell*, 8 *Paige*, 136.) The defendant must state in his affidavit or petition to open the default, the nature of his defence, and his belief in the truth of the matters constituting such defence. (*Hunt v. Wallace*, 6 *Paige*, 372.)

II. The defendants are bound by the acts, as well as the defaults of their solicitor. (1 *Barbour's Ch. Pr.* 100.) As a general rule, when a suit is commenced or defended by a solicitor of the court, or any proceeding is had therein, the court does not inquire into his authority to appear for his supposed client. But where the party for whom the solicitor appears denies his authority, and applies to the court for relief, before the adverse party has acquired any rights or suffered any prejudice in consequence of the acts of such solicitor, the court may correct the proceedings and compel the solicitor to pay the costs to which the parties have been subjected in consequence of his improper interference. If the adverse party, however, has acquired any rights, or been subjected to costs, by proceeding in the name of a party who denies the authority of the attorney or solicitor who commenced such proceedings, and the attorney or solicitor is solvent and responsible, the court usually allows the proceedings to stand; and leaves the party injured to his remedy against such attorney or solicitor. (*The American Ins. Co. v. Oakley*, 9 *Paige*, 496.)

III. It does not appear that the defendants had any defence, or that they have lost any thing by the supposed neglect of their solicitor. 1. All the material allegations in the bill are admitted by the answer. 2. The matters set up by way of defence, as far as facts are stated, do not amount to a defence; and had no replication been filed to the answer, the complainants were entitled to the decree entered. 3. The objection that the arbitrators were not sworn, nor the witnesses, cannot be raised successfully. 4. Wm. Jay could not revoke his award after the same

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was signed by him and his co-arbitrators and delivered to the parties; his power having expired. An award cannot be impeached except for fraud or partiality in the arbitrators. (*Fitzpatrick v. Smith*, 1 *Desaus*. 245.) Awards cannot be set aside or impeached, unless for corruption, partiality or gross misbehavior of the arbitrators, or for some palpable mistake of the law or fact. (*Herrick v. Blair*, 1 *John. Ch.* 101. *Shermer v. Beale*, 1 *Wash.* 11. *Pleasants v. Ross*, *Id.* 156.) Affidavits may be introduced to show partiality or misbehavior in the arbitrators, but not mistakes in law or fact. (*Idem.*) Where there is no charge of corruption or misconduct in arbitrators, and the award on the face of it is final, nothing dehors the award can be pleaded or given in evidence to contradict it. If there is no charge of corruption, partiality or undue practice in the arbitrators, an award will not be set aside, however unreasonable or unjust it may be. (*Tidd v. Barlow*, 2 *John. Ch.* 551.) Change of opinion of one or all the arbitrators, after award returned, cannot affect the award. (*Cleveland v. Dixon*, 4 *J. J. Marsh.* 228.) Where a matter is referred to arbitrators by the mere act of the parties, without being made a rule of court, it is no ground of objection to their award, in an action to enforce it, that it is against law. (*Mitchell v. Bush*, 7 *Cowen*, 186, 7. *Jackson v. Ambler*, 14 *John.* 105; 9 *id.* 212. *Kyd on Awards*, 185, 237, 238.) Where parties have power to transfer real property, arbitrators may award that they shall do it. (*Cox v. Jagger*, 2 *Cowen*, 638.) An arbitrator who has signed an award with his co-arbitrators, cannot be allowed to contradict this solemn act, and to say that he did not concur in it. The signing the report was an actual concurrence therein; and arbitrators are not permitted to make mental reservations in opposition to the written evidence of their decision, any more than a juror who has concurred in a general verdict would be permitted to swear he was not convinced it was right. (*Campbell v. Western*, 3 *Paige*, 137.) An arbitrator is an incompetent witness to impeach his award. (*Van Cortland v. Underhill*, 2 *John. Ch.* 349.) Nor can he be permitted to prove what transpired before him. (3 *Esp.* 38. *Bull. N. P.* 236. *Peake's N. P. C.* 6. 1 *Esp.* 143.

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3 *id.* 113. 2 *Vern.* 717.) The declaration of one of the arbitrators, that had he seen a letter, which being mislaid at the time had not been proved, and had known the contents, he would have acted otherwise, is not sufficient to set aside an award on the ground of mistake. (*Anderson v. Darcy*, 18 *Ves.* 447.) Evidence to show that, by mistake, the arbitrators omitted to allow a demand, will not alter its effect, and is inadmissible. (*Newland v. Douglas*, 2 *John.* 62. *Barlow v. Todd*, 3 *id.* 367. *Wheeler v. Van Houten*, 12 *id.* 311.)

IV. Arbitrators cannot impeach their award, even by their own testimony. (*Campbell v. Western*, 3 *Paige*, 137. *Van Cortland v. Underhill*, 2 *John. Ch.* 347. 3 *Esp.* 38. *Bull. N. P.* 236. *Peake's N. P. C.* 6. 1 *Esp.* 143. 3 *id.* 113. 2 *Vern.* 717.) Fraud in the arbitrators is not pretended in this case, either by the answer of the defendants or their affidavits; nor is any fact stated showing mistake or error in the arbitrators.

V. It does not appear by the affidavits that J. W. Tompkins, the defendant's solicitor, is insolvent or unable to respond fully as to all damages the defendants pretend to have sustained. (See *The Amer. Ins. Co. v. Oakley*, 9 *Paige*, 496.)

VI. The complainants, confiding in the decree, have made expensive improvements on the share or part allotted to Mrs. Winship, and the court will not interfere in such a case.

VII. The defendants have been guilty of great delay in making the present application.

VIII. The defendants have applied once to set aside their default, and have been heard on such application; which application was denied and the decision submitted to by them. They therefore cannot renew it, except upon new facts.

*S. Barculo*, for respondents. I. It is a matter of discretion with the vice chancellor, whether he will open a default or not; and if he opens the default, this court ought not to interfere, unless he errs in the terms he imposes on opening it. II. It is proper to open a default after decree. (*Tripp v. Vincent*, 8 *Paige*, 180.) III. The answer, if proven, is sufficient to set aside and vacate the award. 1. The submission is wholly in-

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sufficient. 2. The arbitration was under the statute, and not at common law, and therefore the arbitrators should have been sworn. They should have heard counsel, and taken the proofs offered by the parties; and not having done either, their award was illegal. (2 R. S. 447. *Elmendorf v. Harris*, 23 Wend. 632. *Van Cortlandt v. Underhill*, 17 John. 408, 414.) IV. If the proceeding was at common law, then the respondents claim that the arbitrators must all agree, and the parties are entitled to be heard by counsel and produce witnesses. (*Green v. Miller*, 6 John. 39.) V. The proceeding was either at common law, or under the statute. The appellants cannot claim that it was mixed. VI. The arbitrators evidently made up their award under a mistake as to the facts, as appears from their confessions; and such an award, a court of equity would not enforce, unless corrected. (2 *Story's Eq.* 679, and cases cited there. 17 John. 405. 4 John. Ch. 408.) VII. The complainants themselves have not followed or obeyed the award; and they have no right to have it enforced, against the defendants, until they have done so.

THE CHANCELLOR. It is unnecessary to examine the question whether the vice chancellor could properly entertain a second motion, to open the decree in this case, while the order of the third of March, 1845, denying the first motion, remained in full force; without asking for a rehearing of that application, in connection with the new matters disclosed by the subsequent affidavits. For, I think, there is not sufficient shown, in the affidavits on which the second application was founded, to induce a belief that the defendants had probably a meritorious defence to the suit. The answer states several acts of misconduct, on the part of the arbitrators, which, if true, might probably be sufficient to vitiate their award, on that ground. But the answer is not sworn to; and there is nothing in the affidavits to show that the defendants even believe those allegations, of misconduct on the part of the arbitrators, to be true. The general affidavit of one of the defendants, that he has stated his case truly to his counsel, and that he is advised by such counsel



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and believes, that they have a good and substantial defence upon the merits, is not sufficient, in this court, to authorize the setting aside of a regular default or decree. But the party who wishes to obtain relief of that kind here, upon the ground that he has a meritorious defence, must state the substance of such defence in the affidavit, on which his application is founded, or must show the facts, upon oath, in some other form; so that the court may see what the alleged defence is, and be able to form an opinion whether he has a meritorious, or only a mere technical defence, or whether he has any defence whatever.

It is alleged, in the answer, that the arbitrators agreed upon by the parties to make the partition, were not sworn. And as that is urged here as an objection to the validity of the award, that alone may be the meritorious defence which the counsel of these defendants has advised them they have in this case. But if that is any defence whatever, it is merely technical; and this court ought not to open a regular order to close the proofs, and a decree founded thereon, to allow the defendants to prove such a defence. On the contrary, if it was proper to open the order to close the proofs for any other cause, the defendants should have been restricted from introducing any evidence to sustain such a technical objection to the validity of the award. For it would be wholly unjust, where parties have suffered the arbitrators to proceed, without requiring them to be sworn, afterwards to urge that they were not sworn, as an objection to the validity of their partition of the farm, because such parties are not satisfied with the decision; and when it was too late to obviate this technical objection, if it is one. (*See Allen v. Francis*, 9 *Lond. Jur. Rep.* 691.)

Nor does the affidavit of either defendant, where it attempts to set out what the defence really is, show that the award is invalid, for any other cause. The affidavit of Hess, merely states that they *claim* that the partition is invalid, and inoperative, by reason of the arbitrators having misapprehended the force and effect of the submission; and by making the award under a mistake as to material facts and circumstances, by which injustice has been done the defendants. In other words,

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they claim that the award, as to the partition, is invalid, because the arbitrators have made an erroneous decision. That, however, would not vitiate the award. For it is well settled that the award, if made in good faith, is conclusive upon the parties; and that neither of them can be permitted to prove that the arbitrators decided wrong, either as to the law or the facts of the case. (*Jackson v. Ambler*, 14 *John. Rep.* 105. *Mitchell v. Bush*, 7 *Cowen's Rep.* 185.) The question submitted to the arbitrators, in this case, was as to what parts of the farm, and how much thereof, should be assigned to the parties respectively. Of course they were to be the exclusive judges of the relative values of the several parcels. And the very object of the submission to them would be defeated by permitting the defendants to prove that the share of the farm assigned to them, by the award, was less than their proper proportion of the whole farm.

What the defendants mean, in their affidavits, by the arbitrators having misapprehended the force and effect of the submission, it is difficult to conjecture; unless it relates to the objection set up in the answer, that the submission did not refer to any land, nor specify the extent of the interests of the respective parties in the property to be partitioned. But if it refers to that, the objection is obviated, by the proof of the fact, that the instrument attached to the submission, and making a part thereof contained a sufficient description of the farm, and of the interests of the parties therein, as tenants in common. The instrument attached, being referred to in the submission, and executed at the same time, the two together formed the agreement for submission. And no one, from reading the two papers together, can have any doubt, without the aid of any extrinsic facts, what land was to be partitioned between the parties, or what undivided portion thereof belonged to each party. The testimony also shows that a part of the premises was encumbered by a privilege, in behalf of the sisters of the former owner of the land. And the arbitrators were right in taking that incumbrance into account, in making an equitable partition between the parties to the submission.

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Neither will it constitute any defence, if they are allowed to examine Judge Jay, to show that after the award had been published, he dissented from it. For, as Judge Vark and Judge Constant, the other two arbitrators, were, by the terms of the submission, authorized to make the partition without his consent, the withdrawal of his consent would not have availed the defendants, even if it had taken place before the award had passed beyond his control. And the defendants' solicitor having neglected to furnish a list of their witnesses, to the adverse party, before the commencement of the examination, as required by the rules of the court, it was improper to give the defendants leave to examine any witnesses they pleased; without any statement in their affidavits as to who their witnesses were, and what they expected to prove by them.

Being satisfied that if the defendants have any defence, in this case, it is merely technical, and not meritorious, and that after a regular decree, they ought not to be let in to set up such a defence, even if the objection is well taken that the arbitrators were not sworn, which is at least doubtful, I think these complainants ought not to have been subjected to the delay and expense of further litigation under the circumstances of this case. I must, therefore, reverse the order appealed from, with costs. And the application of the defendants to vacate the decree, and to open the order to close the proofs, must be denied, with costs to be taxed.

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MANN vs. COOPER and others.

A defendant who has put in his answer, setting up the defence of usury, cannot be made a competent witness for a co-defendant, to establish the alleged usury, by giving a stipulation abandoning his defence to the suit, and consenting that the bill may be taken as confessed against him, and that the complainant may take a decree against him for the amount he may prove to be due.

*It seems,* a defendant, after having put in his answer, has no right to abandon his

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defence for the purpose of rendering himself a competent witness for a co-defendant; without the consent of the complainant, and without obtaining the sanction of the court.

The proper course for the defendant, in such a case, is to apply to the court, upon notice to the complainant, for leave to withdraw his answer and be examined as a witness for his co-defendant.

The provisions of the revised statutes, giving jurisdiction to this court to make a personal decree against the mortgagor, or his surety, or other party who is personally liable for the debt, do not extend to cases where the complainant had no right to come into this court to foreclose the mortgage, as against the interest of any one in the mortgaged premises, or in any part thereof.

THIS was an appeal from an order of the vice chancellor of the seventh circuit, suppressing the deposition of W. H. Cooper, one of the defendants. The bill was filed to foreclose a bond and mortgage given by Cooper; and the defendant Deming, was made a party as a subsequent purchaser of the mortgaged premises. Cooper and Deming put in separate answers, setting up the defence that the bond and mortgage were void for usury. On filing an affidavit that Cooper had no interest in the matter, as to which he was to be examined, Deming obtained the usual order, under the provisions of the 73d rule, for leave to examine him as a witness, as to any matter as to which he was not interested, subject to all just exceptions. When Cooper was offered for examination to prove the alleged usury, it was objected that he was interested in that matter, and was therefore incompetent. He thereupon filed with the examiner a stipulation, signed by himself and his counsel, abandoning his defence to the suit; and consenting that the bill might be taken as confessed against him, and that upon the hearing of the cause the complainant might have a decree against him for the amount he might prove to be due upon the bond. And he was thereupon examined as a witness for Deming, to establish the alleged usury.

*M. T. Reynolds*, for the appellant

*W. F. Allen*, for the respondent.

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THE CHANCELLOR. The vice chancellor is right in supposing that the proffered stipulation did not restore the competency of the witness. Even if Cooper could stipulate his answer off the files, without the consent of the complainant, and without the sanction of the court, the form of the stipulation appears to be objectionable. For it only authorizes the complainant to take a personal decree against him at the hearing, for the amount which he may prove to be due upon the bond; and does not authorize a decree to be entered against him for the complainant's costs. Nor will the taking the bill as confessed against the mortgagor, for want of an answer, entitle the complainant, at the hearing, to a personal decree against him for the whole debt and costs; where the bill is dismissed as to the whole of the mortgaged premises on the ground that the mortgage is void for usury. The provisions of the revised statutes which give jurisdiction to this court, to make a personal decree against the mortgagor, or his surety, or any other party who is personally liable for the debt, do not appear to extend to a case where the complainant has no right to come into this court to foreclose the mortgage as against the interest of any one in the mortgaged premises, or any part thereof. (2 R. S. 191, § 158, 160.) In the case of *Post v. Dart and The Bank of Utica*, (8 Paige's Rep. 693,) the defendant who set up a defence to the suit, had only a lien upon the mortgaged premises, as a judgment creditor. And the dismissal of the bill against the bank would not have prevented a decree and sale of the interest of the mortgagor in the premises, subject to the lien of the judgment; and a decree over against the mortgagor for the deficiency. And a similar decree for the deficiency could undoubtedly be made, within the spirit of the statutory provisions on this subject, where a part of the mortgaged premises only remained subject to the lien of the mortgage, at the time of the decree, so that a sale of that part might be decreed; although the decree of sale could not extend to the whole of the premises embraced in the mortgage.

But even if a personal decree could have been made against Cooper, in this case, for any part of the debt due upon the bond,

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and for the costs of the complainant, in the suit, in case he had suffered the bill to be taken as confessed against him originally, the complainant was not bound to accept of a stipulation to have the defence of Cooper withdrawn; for the mere purpose of enabling another defendant to use Cooper as a witness, to defeat the claim of the complainant upon the mortgaged premises. If it was proper to permit the answer of Cooper to be withdrawn, to enable Deming to use him as a witness, the correct course was to make an application to the court for that purpose, upon due notice to the complainant. Then, if the court had permitted the answer to be withdrawn, it might have imposed such terms, as to the payment of costs which had been occasioned by such answer, or otherwise, as would be proper. And in case the defendants had made a slip, whereby the defence of usury could not be established without applying to the court for this favor, the favor itself might have been refused; except upon the equitable terms of Deming's offering to consent to a decree for what was actually due, with legal interest. Or if the complainant positively denied the alleged usury, upon oath, the court might have refused to interfere upon any terms, in that stage of the suit. The defendant Denning, who had obtained the order for the examination of Cooper, upon an improper affidavit that he had no interest in the question as to which he was to be examined as a witness, certainly had no right to take the decision of those important questions into his own hands; and to change the issue in the cause, as to Cooper, by a mere stipulation, filed in the examiner's office and served upon the counsel of the complainant.

The order appealed from is not erroneous; and it must be affirmed, with costs.

**BROWN vs. BROWN and others.**

[Reviewed, 25 Hun 362, 416.]

**To give a vice chancellor concurrent jurisdiction with the chancellor, the cause or matter for which the suit was brought must have arisen within the circuit of such vice chancellor; or the subject matter in controversy must be situated within that circuit at the time of the commencement of the suit; or the defendants or parties proceeded against, or some of them, must be residents of such circuit, at that time.**

**It seems that executors duly appointed in another state, have a right to take charge of and control personal property of the testator situated here; where there is no conflicting grant of letters testamentary in this state.**

**Where stocks are held in this state by a citizen of another state, at the time of his death, and he dies in that state, leaving a will executed there, the remedy of his residuary legatee, if he wishes to obtain the proceeds of such stocks and the dividends which have accrued thereon, after the debts and general legacies of the testator have been paid, is to cite the executors to prove the will and to take out letters testamentary thereon in this state; and if they neglect to do so, to have himself, or some other person, appointed administrator with the will annexed here.**

**Even if the court of chancery has general jurisdiction to call upon executors, or administrators, appointed in another state or country to account, and to pay over the proceeds of the property of the decedent to those who are entitled to it by the law of his domicile, the fact that a single item of the personal property is situated within one of the chancery circuits, of this state, will not give to the vice chancellor of that circuit jurisdiction of the cause.**

**The bill, in such a case, must be filed before the chancellor, or before the vice chancellor of the circuit where the defendants reside, or where the cause of action arose.**

**To give a vice chancellor jurisdiction on the ground that the subject matter in controversy is within his circuit, it is not sufficient that a small part of that subject matter is situated there. So much, at least, of the subject matter must be situate within the circuit as to enable the vice chancellor to make a decree which will do substantial justice, between the parties, with respect to that part of the subject in controversy to which his jurisdiction extends. And where that cannot be done, the bill must be filed before the chancellor, who has general jurisdiction; or before some vice chancellor who by reason of the residence of the defendants in his circuit, or otherwise, has jurisdiction to make a decree relative to the whole matter.**

**It seems that the legislature, in apportioning the equity jurisdiction, among the vice chancellors, did not intend that in cases where the whole matter in controversy could not properly be litigated in different suits, before the chancellor, separate suits in relation to different parts thereof might be brought before the several vice chancellors within whose respective circuits such different parts of the subject matter of the suit were situated.**

**Where executors, appointed in another state, have a right to receive from a trust company, located in one of the chancery circuits of this state, money of their testator deposited with such company, and to apply it in a due course of administration, at the place where they were appointed, and where they do thus receive it**

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the receipt of such money, by the executors, will not be sufficient to authorize the filing of a bill against them in that circuit, on the ground that the cause, or right of suit, arose within that circuit.

The statute gives to the executor, or the administrator with the will annexed, who may be appointed in this state, and to him only, the right to call the foreign executor to account, for the wrong done to the estate.

Where the court of chancery interferes, in special cases, to protect the rights of creditors or legatees, of a testator, who was domiciled abroad, as to the personal property which is found in this state, and which property is in danger of being lost or squandered before a proper representative can be appointed here to protect it, the court proceeds upon the ground that wherever there is a right there ought to be a remedy, either in this or in some other tribunal. And where no remedy to enforce the right exists elsewhere, chancery will furnish such remedy, whenever it is necessary to prevent a total failure of justice; if the property in controversy, or the person of the wrongdoer is within the jurisdiction and control of the court.

Whether, upon a bill filed before the chancellor himself, the court will entertain a suit to call foreign executors or administrators to account, where the executor or administrator is within the jurisdiction of the courts of the state where he was appointed, and where there is nothing in the bill to show that the complainant has not a full and perfect remedy in those courts? *Quære.*

As a general question of expediency, *it seems* that persons having claims upon a decedent's estate should be compelled to resort to the courts of the country where the decedent was domiciled, and where the personal representatives of such estate were appointed; especially where the claimants are not creditors, but stand in the characters of legatees or distributees of the decedent.

THIS was an appeal from a decretal order of the vice chancellor of the first circuit, allowing the demurrer of three of the defendants in this suit, J. C. Brown, M. B. Ives and R. H. Ives; and dismissing the bill, as to them, with costs. These three defendants, who were the respondents in this appeal, were appointed executors of the will of Nicholas Brown the elder, who died in September, 1841; and who, at the time of his death, was domiciled in the state of Rhode Island, where all the defendants in this suit, then and at the time of filing the complainant's bill, also resided. The complainant was a son of the decedent and one of his residuary legatees, and resided in the city of New-York; and the object of the bill was to obtain an account of the property and effects of the testator, or at least of so much thereof as was invested in stocks or debts, in this state, at the time of his death. N. Brown the elder, previous to 1833, was in copartnership with T. P. Ives, and doing business under the



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name or firm of Brown & Ives. In 1833 the three defendants above named were taken into the copartnership; and the business was continued in the same partnership name. T. P. Ives died in 1835, and thereafter the business of the copartnership was continued by the survivors, without changing the name of the firm, until the death of N. Brown senior in 1841. By the will of N. Brown senior he directed that the firm of Brown & Ives, of which he was the senior partner, should be kept in operation after his death, with all the pecuniary means which it should then possess. He also directed that his share of the copartnership property should remain in the hands and possession of his copartners, who should survive him, for five or seven years at their election, and that no account or inventory thereof should be required or called for by his personal representatives, heirs or devisees, during the time such copartners, or the survivors of them, should elect to continue the copartnership within that time; but that in the meantime his son Nicholas, the complainant, should be paid an annuity of \$1000 out of the testator's share of the copartnership property. And he directed that at the termination of such copartnership his share of the effects and property of the firm, as fast as the same could be realized, should one third be paid to his son the complainant, one third to his other son J. C. Brown, and the remaining third to the two children of the testator's deceased daughter, or the survivor of them. And after making various specific devises and bequests of particular portions of his real and personal estate, to his children and grandchildren and others, and directing the payment of many and large annuities and legacies to his relatives, and to churches and literary and benevolent institutions, all of which were to be paid within, or at the expiration of, the term of ten years, the testator devised and bequeathed all the residue of his estate, real and personal, as follows: one third to the complainant, one third to his other son, and the remaining third to his granddaughters A. Francis and A. B. Francis, the children of his deceased daughter, or to the survivor of them; with a contingent limitation of this third to his two sons, in case both of these granddaughters should die unmarried and before attaining the age of

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twenty-one. The testator appointed the three appellants, together with T. Burgess who subsequently renounced the execution of the trust, to be the executors of his will. He directed that no bond or security should be required of them upon obtaining probate of the will; and he gave power and authority to them, or the survivors of them, to sell and convey any of his real estate not specifically devised. The appellants, in October, 1841, proved the will before the proper probate court in the state of Rhode Island; and letters testamentary thereon were duly granted to them by that court. One of the granddaughters subsequently died under age and unmarried.

In January, 1843, the complainant filed his bill in this cause before the vice chancellor of the first circuit, and made the appellants, and the surviving grand daughter of the testator, together with her father, defendants in the suit. The bill, after setting out these facts, stated that the testator died seised and possessed of a large real and personal estate, which was more than sufficient to pay all his debts, which the appellants, his acting executors, had taken possession of, and that they then held and enjoyed the same; of which estate the complainant was unable to state the precise nature and extent, condition and value, and he therefore claimed a discovery thereof from them, and of the disposition of the property. The bill further stated, that no letters testamentary, or of administration, upon the estate of the testator, had been granted in the state of New-York; that during the continuance of the first copartnership between the testator and T. P. Ives, they made investments, of the profits of their business, in public and private stocks, and other securities; which stocks and securities were purchased, and the investments therein made, in their copartnership name, but which investments were not designed or intended to form or constitute any part of the business capital of the firm; that among the investments thus made, was a deposit of \$50,000, upon interest, with the New-York Life Insurance and Trust Company, in the city of New-York; and large investments in public and private stocks in this state, particularly in the Bank of the State of New-York, and in the New-York Insurance Company; and

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that the said deposit remained unpaid, and the stocks undisposed of at the testator's death. It was further alleged in the bill, that the acting executors of the testator, after his death, withdrew the deposit from the trust company, and had applied the same to their own use; that the appellants had no right or interest in any of the investments in public or private stocks made by the first firm of Brown & Ives, before they became partners, but the said investments were always treated and regarded as the individual property of N. Brown, the elder, and of T. P. Ives; that at the time of the testator's death a large portion of his estate consisted of property, rights and credits, stocks, and other choses in action, to which he was entitled as surviving partner of the first firm of Brown & Ives, of which he and T. P. Ives were the members; that other portions thereof consisted of property, rights, credits, stocks, and other choses in action, belonging to the second firm, of which they and the appellants were members; that other portions thereof consisted of property, rights, credits, stocks, and other choses in action belonging to the third firm, which was formed at the death of T. P. Ives; and that the acting executors of N. Brown, the elder, had taken possession of, and still held, all the property, rights, credits, stocks, and other choses in action, and money to which he was entitled, or in which he was interested as a partner in each of the said firms. The bill also alleged that the respondents had never rendered any account, statement, or inventory, of any part of the said property, rights, credits, stocks, and choses in action, to which the testator was entitled, or in which he was interested as a member of the said several firms, or of the amount, value, or disposition thereof; that the value of such property and effects, and the amounts realized therefrom by the respondents, was several hundred thousand dollars; and that they had applied the same to their own use, and were using the same for their own benefit and emolument. The complainant therefore prayed that the respondents might discover and set forth a full account of such property and effects, and of the testator's interest therein, and the interest, rents, issues and profits received from the said property and effects, &c. He also alleged,

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in his bill, that he believed the respondents, or some of them, unless restrained by injunction, would sell, or dispose of, the public or private stocks in the state of New-York, which were purchased by the testator and T. P. Ives, in the name of the first firm of Brown & Ives. And he prayed for a full account of the administration of the testator's estate, and that the personal estate might be applied to the payment of the debts and legacies in the due course of administration, and that the residue and clear surplus might be ascertained and secured under the order of this court for the benefit of the complainant and the other residuary legatees; or that an account might be taken of the rights, credits, and personal property, and choses in action which belonged to the testator at the time of his death, or in which he was in any way interested, in the state of New-York; and that after payment of all legal charges thereon, the clear surplus might be secured by, and under, the order of the court, for the benefit of the complainant, and the other residuary legatees or that the complainant might have such other, or further, relief as he might be entitled to upon the case made by his bill.

The respondents demurred to the bill for want of equity; and they also stated, as grounds of demurrer, that, as to the property of the testator which was alleged to have been in this state at the time of his death, if they were liable to account for it here, they could only be called on to account therefor by an executor or administrator, who had taken out letters testamentary, or letters of administration with the will annexed, here; that it was not alleged in the bill that any part of the other real or personal estate of the testator was in this state at the time of his death, or at any time since, and, therefore, that the proper tribunals of the state of Rhode-Island alone could call them to account for the same, and that the court in which the complainant's bill was filed had not jurisdiction of that part of the case; that the bill did not charge the respondents with any fraud, breach of trust, or misapplication of any part of the real or personal estate therein mentioned, contrary to their duty as executors; that the vice chancellor had not jurisdiction, because the cause or matter of the suit did not arise within the first circuit, and the sub-

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ject matter in controversy was not situated within that circuit, and the defendants did not reside there.

The following opinion was delivered by the vice chancellor:

McCoun, V. C. If the court of chancery has jurisdiction, so as to entertain this bill at all, that jurisdiction may be exercised by the vice chancellor of the first circuit; some portion of the property in question being situated within this circuit. But the principal ground of this demurrer is, that the defendants being foreign executors, are not liable to be sued or called to an account in the courts of law or equity of this state. The will was made in Rhode Island, where the testator resided, where the bulk of his estate is situated, where the will has been proved, and letters testamentary granted, and where the executors reside. Some funds of the testator had been invested by him in stocks in the city of New-York, and remained so invested at his death, and at the time of the filing of this bill. The complainant, a resident of New-York, is one of the residuary devisees of the estate. And he files this bill for the purpose of calling the defendants to an account, in relation to the whole estate; and of having his residuary share ascertained and secured, or paid to him, and of preventing in the meantime the funds invested here from being transferred or removed out of this jurisdiction. The defendants have not qualified as executors, under the laws of this state; they not having proved the will, nor taken out any letters testamentary here.

As a general rule, suits cannot be brought by or against foreign executors or administrators; that is, they cannot sue or be sued as such, by virtue of their appointment or authority derived from the laws of another state. (*Story's Conf. of Laws*, § 515.) It is true, that previous to our revised statutes, an executor or administrator coming from abroad into this state, and here collecting property or money of the decedent, without first taking out letters under the laws of this state, might be sued as executor *de son tort*. And such was the case of *Campbell v. Tousey*, (7 Cowen, 64.) But the revised statutes have abolished this remedy by action against any person as executor

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of his own wrong, (2 R. S. 449, § 17;) and have made ample provision for a legally constituted executor or administrator (*Id.* 75, § 31.) So that a suit similar to that of *Campbell v Tousey*, could not now be sustained at law.

It is true, there are cases in which the court of chancery will assume jurisdiction over foreign executors and administrators, at the instance of creditors, legatees, and next of kin. But these must be special cases, to be shewn by the bill, and where but for this court's interference there would manifestly be a failure of justice, or hopeless remedy elsewhere. Instances are pointed out by the chancellor in *McNamara v. Dwyer*, (7 Paige, 239;) in which case he deemed himself called upon to assume jurisdiction over a foreign administrator who had left his own country and come to this, bringing with him the property of which he was administrator, and wrongfully applying it to his own use.

The bill in question does not present such a case, nor attempt to show that the complainant cannot have an adequate remedy in the courts of the state of Rhode Island. The complainant is not a creditor seeking payment of a debt contracted with him in the state of New-York, and upon the faith of funds or property placed within this jurisdiction, and which it might be unjust to withdraw from his reach. He is a volunteer, claiming the gift of a residue of a large estate, under a will made in Rhode Island, where the bulk of the property is situated, and where the persons entrusted by the testator with its management reside; and where the testator doubtless contemplated the affairs of his estate should be closed and settled. The will was made with reference to the laws of the testator's domicile; and by those laws the affairs of his estate are to be administered, the accounts to be settled, and the residue to be ascertained and distributed. The complainant, in taking his share, must be left at all events to the operation of the *lex loci*, as to his rights. And in my opinion, he must also be left to pursue his remedy according to the *lex fori* in that state; unless, indeed, he could show (which he has not done) that by some act of the defendants in removing their persons or property from that jurisdiction, any remedy

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which he might undertake to pursue there, would be fruitless.

The demurrer must be allowed, and the bill dismissed with costs.

*T. W. Tucker & S. A. Crapo*, for appellant. The complainant bases his right to assert this claim in our courts of equity upon two grounds: 1st. That a large amount of money, the private property of the testator, which was no part of the copartnership capital, to which the defendants had no claim other than as executors, and which was within the jurisdiction of this state, has been intermeddled with by them and applied to their own use. 2d. That the complainant, being a citizen of this state, has a right to the aid and protection of its equitable tribunals, in compelling the defendants to account to him for his legacy or debt, and of all assets of the testator, wherever received by them, and to pay him his distributive share.

The defendants object, to this claim, that having taken out letters testamentary in Rhode Island, they are amenable to the tribunals of that state only; and that by their obtaining such letters, the courts of Rhode Island obtained the exclusive jurisdiction as to all matters connected with the settlement of the testator's estate.

In filing this bill for relief, the complainants relied chiefly on the authority of *McNamara v. Dwyer*, (7 Paige, 239;) in which case a bill was filed by a resident of New-York against a resident in Louisiana, for an account and distribution. The defendant having taken out letters of administration in Ireland, had brought assets of the estate into New-York. The chancellor there says: "I can see no valid objection to a suit against him in this court, where he may have the full benefit of his administration of the estate abroad, and where full and ample justice can be administered without regard to the technical form of the suit. I have therefore no doubt but that this court has jurisdiction to compel the defendant I. Dwyer to account for and pay over." The authority and applicability of this case has been denied by the defendant, because, 1st It is adverse to

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the principles of law stated by Mr. Justice Story, in his *Conflict of Laws*, page 424. 2d. The case of *McNamara v. Dwyer*, applies only to foreign executors who have brought assets into the state, and not where, as in this case, they have found the assets, here and appropriated them.

The weight of Judge Story's opinion was considered in deciding *McNamara and Dwyer*; and also in the case of *Tunstall and others v. Pollard's administrator*, (11 Leigh, 1,) where a bill had been filed to compel payment of a legacy by an executor appointed in England; he having brought assets into the state of Virginia. Tucker, J. there says, page 25, "I am of opinion that an executor who has qualified and received assets in a foreign country and has brought them into this jurisdiction, is liable to be sued, and to be compelled to account." After examining the cases cited by Judge Story, he continues, "Upon a full review of the whole subject, I am of the opinion, that justice, convenience, and necessity, require a recognition of the right to sue an executor who has qualified abroad, if he comes within this jurisdiction, bringing the assets with him," &c. (*Id.* 36.) The same principle is recognized in the case of *Bryar and others v. McGee, adm'r, &c.* (2 Wash. C. C. Rep. 337,) in which a bill was filed by a creditor against an administrator, who had been appointed under the laws of New-Jersey. A demurrer was interposed by the defendant, on the ground that having taken out letters of administration in New-Jersey, he could only be called to account in that state. The court there say: "The demurrer must be overruled. The defendant having property in his hands, belonging to the estate, may, in equity, be called on for that property in any place."

In this case, it is to be observed, there was no allegation that the defendant had brought assets into the jurisdiction of the court. They were all received elsewhere. So also in the case of *Pugh's ex'rs v. Jones*, (6 Leigh's Rep. 310,) Tucker, J. says: "Upon this interesting question, (i. e. whether a foreign executor who comes into Virginia may be sued,) I shall not at this time offer a definite opinion, as it is not required by the present state of the pleadings. I shall only say that I incline to



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think the action may lie." Again, in *Swearingen v. Pendleton*, (4 Serg. & Rawle, 389,) the question was, whether an executor who had taken out letters testamentary in Virginia, where the testator died, and had before, for a considerable period, resided, was answerable in Pennsylvania for the assets which had come to his hands in Virginia, before his accounts were settled there. He had taken out ancillary letters in Pennsylvania. The court say: "The executor is liable in regard to all assets which come into his hands, whether they arise in the country where letters testamentary are granted, or elsewhere, as in another state, or even in a foreign country; and this principle is well established." (*Dowdale's case*, 6 Co. 46. Cro. Jac. 55.) So in *Evans' adm'r v. Tatem*, (9 Serg. & Rawle, 252,) Tilghman J. says: "If a person who administers in one state, and receives assets there, is not liable on his removal to another state, it would produce the greatest injustice. The removal from state to state, is the act of the administrator, which the creditors of the intestate cannot prevent, and therefore they should not be prejudiced by it. Wherever he goes, he carries with him the obligation to administer the assets." In *Dowdale's case*, it was said: "The jurors have found the substance of the issue, i. e. assets; the finding that they are beyond sea, is surplusage." And in *Campbell v. Tousey*, (7 Cowen, 64,) which was assumpsit, by an administrator against an executor, it appeared that the defendant's testator resided and died in Pennsylvania, and that the defendant had taken out letters testamentary in that state. That as executor, he had received assets in Pennsylvania, and brought them into New-York, and that he had received assets in this state. Under these facts the circuit judge charged the jury that the defendant was liable for all the assets which he still retained in his hands, or which he had expended or disposed of in New-York; unless in the due course of administration, whether they were received in the state or originally received in Pennsylvania. The supreme court, per Sutherland, J. say: "We see no error in this charge."

The principle of law which the above cases seem to aim at establishing, namely, that a foreign executor bringing assets of

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his testator into this state would be liable, in a court of equity at least, to the legatee or creditor, is not impaired or contradicted by any of the cases which Judge Story cites, in support of his position that a foreign executor can neither sue nor be sued in this state. In fact he does not appear to have considered the character of executor as being different in its consequences or liabilities, when regarded as suitor, from that which would attach to him as a defendant. There is a difference, however, which has been frequently recognized as existing, and which it is apparent, from the reason which Judge Story himself gives, must exist. In the case of an executor being plaintiff or complainant, it is remarked that our courts will take no notice of his official character, excepting where it is conferred by the laws and courts of this state. The reason is obvious; his character is a mere creation of the law, and involves certain privileges and immunities. Of course these, so far as they affect the rights or interests of our own citizens, ought not and cannot be conferred by a foreign jurisdiction. Our courts therefore recognize no executors, excepting such as are qualified according to the laws of New-York. But if our courts should allow a foreign executor, when sued, to set up his foreign appointment as a defence, they would in so doing recognize him as executor. That is to say, they would allow him to make use of that character as a shield which he cannot use as a weapon. He may shelter himself from paying his own debts, behind his foreign executorship, when he cannot use it to collect those of his testator. This palpable inconsistency will illustrate the rule of law as it ought to be applied, and the reasons for it. Our courts will not notice the character of a foreign executor, because they will not recognize an artificial legal character, conferring privileges, created by any laws but our own; and when a person having such character, derived from a foreign jurisdiction, is sued here, our courts will not permit such character to be used as a defence, for the same reason. This conclusion, or at least nothing beyond this, will result from a consideration of the cases which Judge Story cites.

All the cases cited by Judge Story apply to the privileges of an executor, not to his liabilities. They consider him as seeking

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to avail himself of that character for the advantage of himself and the estate; but they nowhere consider the character as shielding him from personal accountability. It is in this view of the subject that Chancellor Kent, in *Doolittle v. Lewis*, (7 *John. Ch.* 45,) says that "a party cannot sue nor defend in our courts as executor under the authority of a foreign court of probates;" a form of expression which differs very materially in its meaning from that of Judge Story, viz. "that no suit can be brought by or against an executor." And Chancellor Kent further illustrates his own views of the subject in his concluding remark, that "otherwise the foreign executor might withdraw assets from the state." In truth the reasons which exist against allowing a foreign executor to be recognized as such, in our courts, as plaintiff, will operate with equal force against his setting up that character as a defence, in actions brought against him. Unless this be so, the inconsistency already alluded to must follow, namely, that our courts will not permit a foreign executor, as such, to bring an action on behalf of his testator; but they will allow him to set up the character as a defence in a suit brought against him for his own tort. He will not be able to use his foreign letters to protect the estate; but he may use them to benefit himself. Judge Story himself fortifies this view of the subject. He says, "no nation is under an obligation to enforce foreign laws which may be prejudicial to its own rights or those of its subjects. Persons domiciled in foreign countries are often indebted to persons living in other countries. In such case it would be a great hardship upon creditors to allow a foreign executor to withdraw funds and leave the creditor to seek relief in a foreign domicile." (*Story's Conf. of L.* 421.) And in *Blewitt v. Blewitt*, (1 *Younge*, 541,) Lord Lyndhurst said, "a distinction prevails in all the cases, in suits by and against executors." If an executor who brings assets into this state is liable, in this form of action, a foreign executor who applies assets already here to his own use should be, it would seem, a fortiori liable. As the possession of assets upon which the complainant has a claim, and not the mere act of bringing them into this state, must be the gist of our action, it would be difficult to assign a reason for

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sustaining an action against Rhode Island executors, who come into the state with property of the testator in their possession, which would not give us equal relief against a foreign executor who has applied \$50,000 of the estate which he found within this jurisdiction. The cases of *Campbell v. Tousey*, (7 Cowen, 64,) and of *Swearingen v. Pendleton*, (4 Serg. & R. 389,) expressly recognize it to be law, that "the executor is liable in respect to all the assets which come into his hands, whether they arise in the country where the letters testamentary are granted or elsewhere." Assuming that the courts of this state take no notice of foreign letters testamentary, the want of probate here is no obstacle to our right of action. If this bill had been filed in Rhode Island, before probate, the want of it would have been no defence, if the executors had assented to act. The probate confers no authority whatever. That is derived from the will exclusively. The probate is the legal and statutory evidence of the authority. (*Pinney v. Pinney*, 8 Barn. & Cress. 335.) If, quoth Sir Edward Coke, twenty be named executors, and one prove the will, it is sufficient for them all. (9 Rep. 37, a.) The legatee may accordingly claim his legacy before probate, whenever he can show, aliunde, an acceptance of the trust. (1 Wms. on Exec. 197. 1 Salk. 298.) The case of *Blewitt v. Blewitt*, (1 Younge, 541,) is important. There a bill was filed, and a demurrer put in. Lord Lyndhurst says, "The next question was, whether an executor can be sued before probate. A distinction prevails in all the cases, between suits by and against executors. If executors elect to act, they are liable to be sued, before probate, and cannot afterwards renounce." So in the case of *Dullwich College v. Johnson*, (2 Vern. 49,) the complainant claimed a discovery of the personal estate bequeathed to the college. The defendant pleaded that the will was not proved, and the court overruled the plea.

It is clear, upon the grounds which have already been stated, that if the executor has administered, he will be liable, not only before probate, but though he should refuse to take probate and administration be committed to another. (1 Wms. on Ex. 197. Went. 86. Plowd. 28. Toller, 49. *Duglas v. Forest*, 4

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*Bing.* 704.) The payment of legacies is one of the powers possessed by executors before probate. (1 *Wms.* 172.) An executor is a complete executor for all purposes but bringing actions, before probate. (*Idem.* *Wankford v. Wankford*, 1 *Salk*, 298.) The reason for the exception as to bringing actions is, that the probate is the statutory proof of his appointment. (*Angerstone v. Martin*, 1 *Turn. & R.* 241. *Wms. on Ex.* 994. 10 *Ves.* 13. *Pearson v. Pearson*, 1 *Sch. & Lef.* 12.) If, therefore, a probate is unnecessary to entitle us to relief, and would be no defence to an action brought in Rhode Island, the want of one in New-York can be no objection. And as our courts will take no notice of a foreign appointment, we stand in the same attitude here as we should do before probate granted; supposing our bill was filed in Rhode Island.

The defendants are liable to be held to account in this action, because having accepted the trust, declared by the will, they are to all intents and purposes clothed with the character and duties of trustees. In that character they are amenable every where and in all courts. Executors are, in almost every respect, considered in courts of equity as trustees. Upon this principle those courts exercise a jurisdiction over them. (2 *Wms. on Ex.* 1437. *Adair v. Shaw*, 1 *Sch. & Lef.* 243.) Equity considers the executors as trustees for the legatee in respect to the legacies; and all trusts are the peculiar objects of equitable cognizance. Courts of equity will compel the executor to perform his testamentary trust. (1 *Wms. on Ex.* 169.) The duties of an executor, considered as trustee, are not local nor special; they have a general and received legal signification. (2 *Wms. on Ex.* 1002. *Byrchal v. Bradford*, *Mad. & Geld.* 13, 233.) And in this character the residuary legatee, at all times and places, sues the executor for his legacy.

The complainant in this action has a right to the protection and assistance of the tribunals of his own state in compelling the executor to account for all the assets, wherever received; and payment of his distributive share will be decreed him. This proposition is established by *Campbell v. Tousey*, (7 *Cowen*, 64.) The defendant there was held liable for all the assets retained

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in his hands, or which he had expended or exposed, whether they were received in this state or in Pennsylvania. So in *Swearingen v. Pendleton*, (4 Serg. & Rawle, 489,) the court say the executor is liable for all assets, whether they arise in the country of probate or elsewhere.

*C. O'Connor*, for the respondents. The complainant insists that any individual, holding the appointment of executor under the laws of a sister state, who happens to come within this state, and remains long enough to be served with process, may be made amenable to an action at law by creditors, and to a bill in equity by legatees, for an account, in respect of all property yet unadministered which may have been in his hands at any time, or in any place. Many authorities are cited in support of this inconvenient doctrine. In the present state of the law in this state, little would be gained by a critical examination of all those authorities. It may suffice to state, in brief, that prior to the revised statutes, the following principles were recognized by competent judicial authority: *First*. An administrator could neither sue, nor be sued, at law, except within the jurisdiction from which he received his appointment. *Secondly*. Any person who intermeddled with the goods of a deceased person, was sueable, as executor, at law, by creditors; and he could not defeat the action, except by showing that he was an administrator legally appointed within the jurisdiction in which the suit was brought, (8 *John*. 126;) or that he acted as agent of such an administrator, or of an executor who had taken out letters testamentary within the jurisdiction. (*Peake's N. P. Cases*, 86.) Under any other state of facts he was responsible to the action, either as rightful executor, or as executor de son tort; and between those characters the pleadings never discriminated. (3 *Bac. Abr.* 21, *tit. Executor*, § 3, *subd.* 1, 2, 3.) It may be a qualification of this rule, that if there was a rightful executor, or administrator, within the jurisdiction, creditors could not charge the intermeddler in this way; but that the rightful executor, or administrator, must sue him as a mere wrongdoer in trespass, or some similar action.

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A person having received property in a foreign state, under letters testamentary, or of administration granted there, was never responsible, in an action at law in this state, in respect of such property; even though he brought such property into this state. What is said to the contrary in *Campbell v. Tousey*, (7 Cowen, 64,) is obiter, and was not then law. (*Jauncey v. Seales*, 1 Vern. 397.) The defendant, in *Jackson v. Tousey*, was fixed with the character of executor by his receipt of property in this state. He was fixed with liability for the whole debt on this ground alone, without reference to the assets brought hither from Pennsylvania; because he had pleaded the false plea of ne unques executor. (*Story's Conf. Laws*, §§ 512, 514.)

So far we have been dealing with the case of creditors and others having a right of action against any one who might represent the deceased. But in respect to the rendering of an account to legatees and next of kin, the law was otherwise. The ecclesiastical, probate, or surrogates' courts, never claimed jurisdiction to compel a foreign executor, or administrator, to account for, and distribute, the estate. But the court of chancery, that great receptacle of all undefined powers and remedies, has occasionally interfered, on the ground of necessity; to prevent a gross breach of trust, and a total failure of justice. (*McNamara v. Dwyer*, 7 Paige, 239. 11 Leigh, 24, 29.) The case of *McNamara v. Dwyer* must be considered as a disclaimer of jurisdiction to compel a foreign executor, or administrator, to account when he is amenable to the process of his own country. For Chancellor Walworth expressly places his assumption of cognizance on the necessity of the case.

There is no decision, or even dictum, in this state, in favor of the jurisdiction now asserted. On the contrary, even in *Campbell v. Tousey*, (7 Cowen, 67,) the case so much relied upon by the appellant, Judge Sutherland, in delivering the opinion of the court, says, that the executor "cannot be compelled to account here, even in respect to the assets received in this state; for, not having taken letters of administration here, he is not amenable in that way to any of our courts." Thus stood the old law. As it respects creditors, any one who administered might be

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charged at law as executor. None but a rightful executor, or administrator, admitted under the local law, could however be prosecuted as such in a court of probates, or chancery, by distributees or legatees, for an account of the estate. The rule that a domestic executor, duly appointed by the will, who acts without probate, would not be permitted to set up that delinquency, and thus bar an account by pleading his own wrongful omission, presents a special case, to which very familiar principles apply. The exercise of jurisdiction over a foreign executor, or administrator, who has withdrawn himself and the estate from the coercive power of the foreign tribunal, and seeks to make our state a city of refuge, from just responsibility, for himself and his fraudulent acquisition, presents another special case proper for the application of a peculiar and extraordinary remedy. A new administrator appointed in this state would have no authority to take from the foreign administrator assets received abroad under his foreign appointment. But the present case, in no wise, resembles either of these. The defendants now reside, and have always resided at the place of the domicil of their testator, and of their appointment. (6 *Wend.* 115.) They are fully amenable to process there. It would, therefore, seem to be very clear that this court ought not to assume jurisdiction as to the foreign assets. If it is a question of judicial discretion, the court certainly would not interfere. (*Story's Eq.* § 58. *Hamilton v. Cummings*, 1 *John. Ch. R.* 523.) How is it as to the assets received in this state?

The authorities referred to sufficiently show that the receipt of those assets would, previously to the revised statutes, have enabled a creditor to charge the defendants as executors *de son tort*. They, by no means, establish that, at any day, this court would have compelled the executor to account in the courts of this state, to the legatees, or distributees. On the contrary, Story says, in his *Conflict of Laws*, (§ 515,) that such collection of assets is not unlawful, and that the distributees should still be left to the forum of the original administration.

Whatever perplexity there might be as to the assets received in this state, in arguing through the maze of cases founded



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upon the rights of creditors at common law, and the supposed analogy between those rights and the rights of legatees, or distributees, in a court of equity, the provisions of the revised statutes have obviated all difficulty. *First.* Executors, before letters testamentary granted, have no power to dispose of any part of the estate of the testator, except to pay funeral charges, nor to interfere with such estate in any manner, further than is necessary for its preservation. (2 R. S. 71, §§ 15, 16.) *Secondly.* No person shall be liable to an action, as executor, in his own wrong, for having received, taken or interfered with, the property, or effects, of a deceased person; but shall be responsible as a wrongdoer, in the proper action, to the executors, or general, or special, administrators, for the goods taken, and damages. (2 R. S. 449, § 117.) Here is an extinction of this nondescript character, an executor by wrong chargeable as an executor of right. Many incongruities arose from its existence; and its abolition was very creditable to the legislature. No evil, or mischief, attended the abolition; for a complete and perfect remedy was declared. A remedy which preserves the harmony of the law, is convenient in itself, and secures all the ends of justice.

It may be said that the last of those provisions applies only to suits at law. We admit it, because it is only at law that an executor de son tort was ever known. An executor de son tort accounting to the legatees, and administering the estate, under the direction of a court of equity, was never heard of. But as cases, showing the liability to a suit at law of an executor de son tort, are cited as authorities for this suit, we refer to this clause of the revised statutes, and insist that it puts an end to the direct authority of those cases; and must, of course, prevent the assumption, by this court, of a similar jurisdiction from analogy. An executor who has not proved the will and taken out letters testamentary, is now forbidden to appear and represent the estate in this, or any other, court. Under the circumstances detailed in this bill there could not be an executor in this state; for where the will of a non-resident has been proved and letters testamentary taken in another state, the revised

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statutes prescribe that letters of administration shall be granted on the assets in this state. (2 R. S. 75, § 31.)

Except in cases like *Dwyer v. McNamara*, where, to prevent a failure of justice, and of absolute necessity, a court of equity acts, in aid of the evaded and defeated functions of the foreign jurisdiction, it is an established rule, that if the personal estate of a deceased person is sought to be administered by a bill in equity, an executor, or administrator, holding letters testamentary, or of administration, under the laws of the forum, is an indispensable party. (*Humphreys v. Humphreys*, 3 P. Wms. 350. *Logan v. Fairlie*, 2 Sim. & Stu. 284.) In the last case Sir John Leach did not decide that the foreign executor was not a sufficient representative of the decedent. That point was not raised, and consequently not touched by the court. We suppose there was no room to raise it in that very special case. He decided, however, that the next of kin of the legatee, who had died before payment of his legacy, could not maintain a suit for it, and that his administrator was the proper plaintiff. It is a case in point for the general principle, that a regular executor or administrator, must be before the court. The case in 5 *Randolph*, 51, supposed to conflict with Sir J. Leach, it is submitted does not so conflict. In that case it was held, as a strict legal point, arising upon the construction of the commission of an executor de bonis non, that a devastavit was an administration, that the goods converted and wasted by the first executor were not goods not administered; and consequently were not within the commission of the "administrator of the goods not administered." As a consequence it was held, by a majority of the court, that the administrator de bonis non could not call the representatives of the first executor to account for the property wasted. It is submitted, 1. That the decision in that case does not determine that the administrator de bonis non is not a necessary party; but only that he shall not be sole plaintiff. Perhaps the court would have held, if the point had been before them, that, either as co-plaintiff, or as defendant, his presence, as a party to a suit for administration, was indispensable. 2. The dissenting opinion of Judge Coalter shows, most satis-

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factorily, that the majority of the judges erred: (5 *Rand* 97,) and the decision is certainly in conflict with another case in the same court. (3 *Id.* 287.) 3. Our revised statutes certainly contemplate that all property not applied in due course of administration comes within the description of "goods not administered," according to Judge Coalter's opinion. (2 *R. S.* 79, §§ 45, 46.)

Perhaps, previously to the revised statutes, the defendants might have been held to account, in this court, as to the assets received here; on the ground that they were named executors in the will, and derived their authority directly from the testator, and had intermeddled with, and administered, assets found in this state. Such administration, perhaps, might be deemed as not authorized by the foreign letters testamentary, and consequently an assumption of the office of executor, as much as if they had proved the will and taken letters testamentary in this state; the court acting upon their unlawful interference with the assets here, and refusing to permit them to set up their own wrong in not proving the will and obtaining letters testamentary.

But the revised statutes have abolished; both at law and in equity, the practice of treating parties as executors in their own wrong; and have limited the accountability of those who improperly intermeddle in the administration, to a proper action at the suit of the rightful executor, or administrator. And in this particular case, those statutes declare that there can be no executor in this state, but that the assets found here must be administered by means of auxiliary letters of administration to be issued thereon by a surrogate.

It is therefore submitted, that the decision of the vice chancellor, in this case, was manifestly right. The complainant might have taken out letters of administration and maintained trespass against the defendants as mere wrongdoers, unless the foreign letters warranted them in collecting the assets here; and if the foreign letters did confer such authority, then the legatees must resort to the forum from which such letters issued, for an account and distribution.

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*T. W. Tucker & S. A. Crapo*, in reply. The defendants' counsel concedes that previously to the revised statutes, the defendants might have been held to account in this court as to the assets received here. It remains, therefore, merely to ascertain whether the revised statutes have deprived the complainant of the right claimed by him to seek redress in the tribunals of this state, which he confessedly had previous to their enactment. The assumption of the defendants' counsel is, that the jurisdiction of our courts was founded upon an unlawful interference by the foreign executor with the assets in New-York. In other words, that he became an executor de son tort. It is insisted that such was not the ground of the jurisdiction.

All the authorities cited by us in our opening argument, establish the principle that the interference of the executor with the assets of the testator wheresoever situate, was lawful and right; because he derived his authority from the will, and not from any probate thereof, or letters testamentary granted there upon. Probate and letters testamentary were required only when prosecuting or defending a suit at law or in equity, as evidence of his title to that character; but in all cases where the aid or protection of the judicial tribunals was not required, he might act, and act rightfully, without either such probate or letters. Wherever he could possess himself of the property of his testator, without invoking the aid of the courts of law or equity, he might rightfully do so.

We do not claim the jurisdiction of this court over these defendants upon the ground that they have unlawfully interfered with the property here; nor was that jurisdiction exercised by the court in the like cases previous to the revised statutes, upon that ground. In the case of *McNamara and Dwyer*, the defendant had not unlawfully intermeddled with any assets in this state. Again, in *Bryan v. McGee*, (2 Wash. C. C. R. 37,) the defendant had not possessed himself of any assets within the jurisdiction of the court. And it was upon a demurrer, similar to that interposed in this case, held that the defendant having property in his hands belonging to the estate of the decedent, might in equity be called on for that property in any place.

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So too in *Tunstall v. Pollard*, (11 *Leigh*, 1,) the executor had not unlawfully intermeddled with any assets in Virginia, and Tucker, P. in delivering the opinion of the court, expressly puts the ground of the jurisdiction upon the fact that the executor had rightfully possessed himself of the property. He says: "If the executor was appointed in England, and came to Virginia, without having qualified, and received assets in Virginia, he might be sued here." The case there put by the learned judge is precisely that now presented. Executors appointed in Rhode Island, have come into the state of New-York, and, without having qualified, have received assets in this state. Can they not, in the language of the learned judge, be sued here? The ground of the jurisdiction of this court, therefore, never rested upon any unlawful interference of the executor with the assets here; for such interference was, in point of fact, lawful. But upon the ground that having assumed upon himself the office of executor and trustee, he might be called upon to account for the just discharge of the duties which he had assumed, in all places and in all jurisdictions. In the liabilities of an executor, and in the place of his accountability, he does not differ from any other trustees. The remedies against a trustee are not local; to be enforced only where the trust was created and the power conferred, or where the property, the subject matter of the trust, was acquired. Those remedies are universal, to be enforced wherever the court obtains jurisdiction over the person of the trustees. If Mr. Brown, the testator, had, in his lifetime, made a deed declaring the same trusts as those which result from his will, would there have been any doubt as to the jurisdiction of this court? It is difficult to perceive any difference between the case of parties deriving their authority from a will, from what would exist in case it was derived from a deed. The revised statutes, therefore, upon the subject of executors de son tort, have no applicability to this case.

It is said that the entertaining of jurisdiction, in this case, will be attended by inconveniëce. If this were true, it would be no answer to the claim, by a citizen of this state, to have the aid of its tribunals of justice in the assertion of his rights. But

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the assertion is not correct in point of fact; as is fully demonstrated in the opinion of the chancellor in the case of *McNamara v. Dwyer*.

The defendants' counsel also insist that the jurisdiction of this court cannot extend over the property of the decedent which was situated in the state of Rhode Island.

The case of *Swearingen v. Pendleton*, (4 *Serg. & Rawle*, 489,) cited in the opening argument, is conclusive upon this point. The court there say: "The executor is liable in respect to all assets which came to his hands, whether they arise in the country where the letters testamentary are granted, or elsewhere, as in another state, or in a foreign country; and this principle is well established." So also the case of *Bryan v. McGee*, (2 *Wash. C. C. R.* 337,) just referred to, is a direct authority on this point. The defendant having property in his hands belonging to the estate may, in equity, be called upon to account for that property in any place. Indeed, it would be impossible to adjust the rights of the parties to the assets received in this state without a full account of all the property which has come to the hands of the executor. It is suggested that the complainant should himself have taken out letters of administration in this state. It is a sufficient answer, that the defendants, by statute, are entitled to a priority in such letters, and that the mere notice of an application for such letters would enable the defendants to elude an accountability here, by removing all the property out of our jurisdiction.

Finally, the complainant is turned to the tribunals of Rhode Island for relief; the defendants being, as it is said, fully amenable to their process. That a citizen of New-York should prefer to have his rights adjudged by the courts of his own state, and not be put to the expense and inconvenience of prosecuting them in another jurisdiction, is by no means surprising; even if he had no objection to the nature, constitution and manner of administering justice there. As it is, the complainant claims the protection of the laws of his own state, and the aid and assistance of this court.

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**THE CHANCELLOR.** The first question which I shall consider in this case is, whether the suit could be rightfully commenced before the vice chancellor of the first circuit; even if the court of chancery in this state had jurisdiction and authority to grant relief to the complainant, upon the case made by his bill. To give a vice chancellor concurrent jurisdiction with the chancellor, the cause or matter which authorized the complainant to file a bill in chancery, for the discovery or relief sought, must have arisen within the circuit of such vice chancellor; or the subject matter in controversy between the parties must be situated within that circuit at the time of the commencement of the suit; or the defendants or parties proceeded against, or some of them, must be residents of such circuit at that time. (2 R. S. 168, § 2.) Here none of the defendants, against whom the relief is sought, nor even those residuary legatees who had a common interest with the complainant, and were therefore merely nominal defendants, resided in the first circuit at the time of filing this bill.

Nor was the subject matter in controversy in this suit situated in that circuit, so as to give the vice chancellor jurisdiction of the cause on that ground. The complainant, it is true, alleges in his bill, that the testator and his first copartner made large investments in public and private stocks in this state, in the name of their firm; and that such stocks remained undisposed of at the time of the testator's death. But it does not appear, except by mere inference, that any of such stocks were originally situated within the first circuit; or if they were, that any stocks remained in that circuit at the time of the filing of this bill. The bill alleges that some of the investments were in stocks of the Bank of the State of New-York and of the New-York Insurance Company. And as those corporations are by law to keep their offices in the city of New-York, it may perhaps be fairly inferred, that those particular investments were originally situated in the first circuit, so far as such property can be said to have any locality. But it is not alleged by the complainant that the stocks of these corporations, or either of them, originally held in the name of the first firm of Brown & Ives, remained undisposed of when this suit was commenced; although it appears they had not

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been sold at the death of the testator. On the contrary, it is charged in the bill that the appellants had taken possession of, and held all the property, rights, credits, *stocks* and other choses in action and money, to which the testator was entitled, or in which he was interested as a copartner, in either of the firms, at the time of his death, and had applied the same to their own use.

It is true the appellant's counsel insist that the respondents were not authorized, under the letters testamentary granted to them in Rhode Island, to sell or otherwise intermeddle with the stocks and other property belonging to the testator in this state; and that no one except an executor who had taken out letters testamentary in this state, or an administrator with the will annexed, duly appointed here, had any power or control over such property. I had occasion to examine that question in the recent case of *Vroom v. Van Horne*, (10 *Paige's Rep.* 550,) and was inclined to adopt a contrary conclusion; though it did not become necessary to express a definitive opinion on the subject, as the decision of that case was finally placed upon another ground. If the counsel for the appellants are right, however, in reference to that question, then the vice chancellor clearly had no jurisdiction whatever in relation to the stocks, if any, which were standing in the name of the testator and his first copartner; upon the books of the Bank of the State of New-York, or of the New-York Insurance Company, at the time of the commencement of this suit. For in that case such stocks could not be sold or transferred, so as to give any right to the purchaser, until letters testamentary, or of administration with the will annexed, were granted to some one, by the proper tribunal in this state. And the only remedy of the complainant, as one of the residuary legatees, if he wished to obtain the proceeds of such stocks and the dividends accrued thereon, after the debts and general legacies of the testator had been paid, was to cite the executors to prove the will, and take out letters testamentary thereon in this state; and if they should neglect to do so, to have himself or some other person appointed administrator with the will annexed, here.

Again; if this court has general jurisdiction to call upon executors or administrators, appointed in another state or country



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to account, and to pay over the proceeds of the property of the decedent to those who are entitled to it by the law of his domicile, the fact that a single item of the personal property is situated within one of the chancery circuits of this state, does not give to the vice chancellor jurisdiction of the cause. For the subject matter in controversy, in such a case, is not the particular portion of the decedent's personal property which is situated within that circuit. Thus, if a testator residing in the third circuit should make his will and die there, and letters testamentary thereon should be granted to the executors, who resided there at the time of the commencement of a suit by the residuary legatee for an account of the administration of the estate, and for the payment to him of the surplus, the mere fact that a part of the debts due to the testator were due from debtors who resided in the first circuit, or that some of the testator's property, at the time of filing the bill, consisted of stocks in one of the banks in that circuit, would not give the vice chancellor of the first circuit jurisdiction of the case. But the bill, in such a case, must be filed before the chancellor, or before the vice chancellor of the circuit where the defendants resided, or where the cause which entitled the complainant to file such bill arose. Nor would it be consistent with the spirit of the statute in relation to the jurisdiction of vice chancellors, to allow the residuary legatee to file a bill before the vice chancellor of the first circuit, in the case supposed, for the purpose of having an account and a distribution of that part of the testator's estate which happened to be in that circuit. To give the vice chancellor jurisdiction of a case, on the ground that the subject matter in controversy is within his circuit, it is not sufficient that a small part of that subject matter is there. So much, at least, of the subject matter in controversy between the parties, must be situate within the circuit, as to enable the vice chancellor to make a decree which will do substantial justice between the parties relative to that part of the subject in controversy as to which his jurisdiction extends. And where that cannot be done, the bill must be filed before the chancellor, who has general jurisdiction; or before some other vice chancellor, who by reason of the residence of

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the defendants in his circuit, or otherwise, has jurisdiction to make a decree relative to the whole matter. The legislature, in apportioning the equity jurisdiction among the vice chancellors, could not have intended that where the whole matter in controversy, between the parties, could not properly be litigated in different suits before the chancellor, separate suits, in relation to different parts thereof, might be brought before the several vice chancellors within whose respective circuits such different parts of the subject matter of the suit were situated. Thus if a mortgage, for the security of one entire debt, upon two or more parcels of land lying in different circuits, is executed out of the state, or out of both of those circuits, and the owner of the equity of redemption; and other parties who are proper to be made defendants to a bill of foreclosure, all reside out of those circuits when a suit to foreclose the mortgage is commenced, the vice chancellor of neither of those circuits will have jurisdiction of the case; unless the mortgagee thinks proper to relinquish his claim upon that portion of the mortgaged premises which is not situated in the circuit of the vice chancellor before whom he files his bill.

The same or still greater difficulties will be found, in attempting to sustain the jurisdiction of the vice chancellor, in this case, upon the ground that the cause or matter in relation to which the complainant seeks relief, arose within the first circuit. The only thing that has occurred in the first circuit which could lay a foundation for any claim against the appellants, in favor of any one, is the receiving of the money which was deposited in the Trust Company. And if the executors, under the letters testamentary granted in Rhode Island, had, as between them and the legatees of the testator, a right to receive that money, with the consent of the company with whom it was deposited, and to apply it in a due course of administration at the place where the testator was domiciled, and where the executors proved the will, as I think they had, then no cause or right to bring this suit arose within the first circuit. For it is not alleged that any breach of trust or any misappropriation of the property or funds of the testator's estate has taken place here.

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And the only right of the complainant to call the appellants to account for the money received of the trust company, arises from the making of the will of the testator, appointing them executors, the death of the testator, and the assumption of the trust of executors by them; all of which matters arose or occurred in the state of Rhode Island. Even if the complainant's counsel are right in supposing that these executors could not be permitted to receive the money of the testator in this state, by the voluntary payment of the debtors, for the purpose of paying the debts and legacies, and distributing it with the other funds of the estate according to the directions of the will, without taking out letters testamentary here, still the objection exists, even as to this portion of the funds belonging to the estate, that the statute gives to the executor or administrator with the will annexed, who may be duly authorized by the proper probate court of this state, and to him only, the right to sue for the wrong done to the estate. (2 R. S. 449, § 17.)

It is not necessary to express any opinion as to the extent of the jurisdiction of the court of chancery in this state to protect the rights of creditors or legatees, of a testator who was domiciled abroad, in the personal property which is found in this state, where there is a probability that it will be squandered and lost, by the act of a wrongdoer, before a proper representative of the estate can be appointed here to protect it. It is sufficient to say, that where this court interferes, in special cases of that or a similar character, it proceeds upon the principle that wherever there is a right there ought to be a remedy, either in this or some other tribunal. And where no remedy exists elsewhere to enforce the right, this court will furnish such remedy, whenever it is necessary to prevent a total failure of justice; where the property in controversy, or the person of the wrongdoer, is within the jurisdiction and control of the court. Nor do I intend to decide the question here, whether, upon a bill filed before the chancellor, whose jurisdiction is not limited by any localities, and where either the subject matter in controversy, or the person of the defendant is even temporarily within the state, or where the defendant appears voluntarily to the suit without

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the service of process here, this court will, in an ordinary case, entertain a suit to call foreign executors or administrators to account. By an ordinary case I mean one in which the executor or administrator, is within the jurisdiction of the courts of the state or country where the testator or intestate was domiciled at the time of his death, and where the letters testamentary or of administration were granted; and when there is nothing in the complainant's bill to show that he has not a full and perfect remedy in those courts. As a question of expediency, certainly, those who have claims upon the estate, ought to be compelled to resort to the courts of the country where the decedent was domiciled, and where the personal representatives of his estate were appointed; especially where the claimants are not creditors, but stand in the characters of legatees or distributees of the decedent. I intend to place my decision in the present case, however, upon the special ground that the vice chancellor before whom the bill was filed had no jurisdiction of the case; even if the case made by the complainant would have entitled him to relief upon a bill filed before the chancellor.(a)

The decretal order appealed from must therefore be affirmed, with costs.

(a) In *Whyte, adm'r &c. v. Rose*, (3 Ad. & El. N. S. 493,) it was held by the court of exchequer chamber, (reversing the judgment of the court of queen's bench,) that it was no answer to an action of debt on a deed, by an administrator under a prerogative administration from the archbishop of Canterbury, that the intestate died abroad, and that, at the time of his death, the deed was in *Ireland*, and was *bona notabilia* to be administered in Ireland.

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 BARNARD and others vs. DARLING.

[Followed, 9 Abb. N. C. 461.]

Irregularities in the proceedings in a court of law can only be objected to there.

They cannot be taken into consideration in the court of chancery, in a creditor's suit brought upon the judgment at law.

The jurat to a bill of complaint is not rendered defective by the want of the statement of the county where the bill was sworn to

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THIS was a creditor's suit. The bill was in the usual form of a creditor's bill, and purported to have been sworn to by the complainants in the usual manner, except that the statement in the jurat was in this form: "State of New-York, — county, ss." And the oath was signed "O. O., comm'r of deeds," without specifying the county or city for which the person signing it was a commissioner. It appeared, however, that he was in fact a commissioner of deeds for the city of Albany.

*C. P. Collier*, for the defendant, moved to dismiss the bill of complaint, or to have it taken off the files, for a variety of formal objections; most of which related to the regularity of the complainant's proceedings in the court of law. He also objected that the bill was not properly verified; the jurat not stating where the oath was administered.

*Otis Allen*, for complainants.

THE CHANCELLOR decided that objections to the regularity of the complainant's proceedings in obtaining their judgment at law, or in issuing and returning the execution, or in executing the same, could not be considered by this court; but that the defendant must apply to the court of law for relief. He also held that there was no validity in the objection to the form of the jurat; as the complainants could be convicted of perjury upon such a jurat, if they had sworn falsely; and that as the officer before whom the bill was sworn to was only authorized to administer the oath within the city of Albany, the legal presumption was that he had not violated his duty by doing it elsewhere.

Motion denied with costs

### FRAZER and others *vs.* WESTERN and others.

[Affirmed, 3 Den. 610; How. Cas. 448.]

The law sanctions a conveyance founded upon the consideration of blood or marriage merely. And the legal presumption is, that such a conveyance is valid, and not a fraud upon the rights of any one.

The mere fact that a purchaser, from the holder of such a conveyance, has notice that it was not founded upon a pecuniary consideration, is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent. He has a right to act upon the legal presumption that such a deed of gift, or voluntary settlement, was honestly made; unless some other fact is brought to his knowledge, to raise a suspicion in his mind that the conveyance was intended to defraud some one.

Where a deed, executed previous to the revised statutes, conveyed certain premises to a trustee, upon a mere naked trust; in the first place, for the use and benefit of M. C., a married woman, and her heirs and assigns forever; and *secondly*, to convey the premises to such person or persons as she should, by will, or by her certificate in writing, during her life, and after the death of her husband, designate; and if no such last will and testament should be made, or certificate given, then to convey the premises to her heirs after her death; *Held* that the trustee was a mere naked trustee of the legal estate, with a bare power in trust to convey the premises to her devisee, grantee or heirs; either during her life or afterwards. And that the equitable interest of the cestui que trust was turned into a legal estate in the premises, in fee, by the operation of the 47th section of the article of the revised statutes relative to uses and trusts; especially after the death of her husband.

*Held also*, that the whole beneficial interest in the trust property belonged absolutely to the cestui que trust, with the single exception that she could not alienate the same during the joint lives of herself and her husband, without his consent; nor without the concurrence of the trustee.

*Held further*, that, upon the death of her husband, the cestui que trust became absolutely entitled to the land, for all purposes; and that the estate to which she was then entitled in equity, under the provisions of the trust deed, was, an absolute right to the possession of the property, and to the receipt of the rents and profits thereof, and the power to dispose of the same to any person, by deed or will. And that in case of her death without will, and without alienating it in her lifetime, it would descend to her heirs at law, in the same manner as if the legal title had been conveyed to her at the time she acquired her equitable interest in the property, by the deed of trust.

Whether the cestui que trust would not have had the right to devise the premises, during the life of her husband, so as to vest the legal title in the devisee, without any conveyance from the trustee, under the provisions of the revised statutes relative to powers, in connection with the operation of the 47th section of the article relative to uses and trusts? *Quære.*

A bona fide purchaser of property, from a previous grantee, to whom it had been

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conveyed for the purpose of defrauding creditors, is entitled to protection against the claims of the creditors who were intended to be defrauded by the first conveyance.

THIS was an appeal by the defendant, H. M. Western, from a decree of the late assistant vice chancellor of the first circuit, setting aside a conveyance from I. G. Collins, deceased, to E. K. Collins, in trust, for Mary Collins, of certain lands upon Staten Island, which were subsequently sold and conveyed by her to the defendant Western. The ground upon which the complainants sought to set aside the trust deed was, that it was fraudulent and void as against them, as creditors of I. G. Collins.

The following opinion was delivered by the assistant vice chancellor :

HOFFMAN, A. V. C. The bill was filed for the purpose of setting aside an alleged voluntary and fraudulent settlement of property, made by Israel G. Collins, deceased ; the title to which is now vested in the defendant Western.

In the year 1817, John Mathews, of South Carolina, made his will, by which he gave, among other bequests, to his executors, in trust, for his daughter Mary, then the wife of Israel G. Collins, the one half part of certain slaves, to her use, during her life, free from the control of her husband ; and upon her decease, to her children equally ; with a power of disposition, if there were no children. Upon an application to the court of chancery of South Carolina, a sale of the slaves was ordered, under the direction of a master, and it was further ordered that Israel G. Collins and John Frazer should be substituted as trustees of the portions coming to their respective wives, on their giving to the master ample security, in double the amount of the property to be received by them, to secure the same to the uses and trusts prescribed by Mathews' will. The proportion of Mary Collins, of the proceeds, amounted to \$7596,25 ; and this sum was paid over to Collins, by the court, on his giving a bond, with Frazer as security, in double the amount, dated 26th of February, 1818. The bond was given to the complainant, William H. Gibbs, under whose direction, as master, the sale was made. The

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condition recited the proceedings, and was, that the obligors should be answerable for the amount, subject to the trusts of the said will. On the 7th of August, 1828, Israel G. Collins conveyed to Edward K. Collins, certain property in the city of New-York, by one deed, and a farm on Staten Island, the subject of the present suit, by another deed. Both conveyances were upon trusts for his wife, which it may be necessary afterwards to notice.

In the year 1831, Israel G. Collins died. On the 8th day of April, 1833, Mary Collins, the widow of Israel G., sold the property to the defendant Western, giving him a certificate which under the trust deed was prescribed, and which he insists entitles him to a conveyance from the trustee. The bill was filed on the 30th of April, 1833. Mary Collins died in 1835, and her whole interest in the original bond vests in her children, who are made defendants. If the deed to Western is sustained, the right to the property is vested in him. The complainant Freeman, is a master of South Carolina, who has succeeded to the office of Gibbs. Frazer is the surety in the bond.

It is necessary to put the case upon the ground of a surety applying to this court to compel the principal, or his estate, to indemnify him. No question can exist as to such right, when the debt is due, and the principal is insolvent. This is the plain doctrine of the civil law; and some cases in the court of chancery have gone further. (*Digest*, 17, 1, 22. 1 *Domat*, Book 3, tit. n. § 3. 4 *Inst.* 3, 21. 6 *Code Napoleon*, 3, 14, 2, art. 2032. *Huber*, lib. 3. *Just.* 21, 11. *Earl of Ranelagh v. Hayes*, 1 *Vern.* 190. *Lee v. Rook*, *Moseley*, 318. *Campbell v. Macomb*, 4 *John. Ch. R.* 538. *Cock v. Ravie*, 6 *Ves.* 284.) But, in truth, payment of the bond might be called for at any time, even during Collins' life, and when no default had been made in paying the interest, I think this could have been done. Certainly upon his insolvency, or after his death. The public officer of the court was the obligee, and a trustee, and had a right to sue when he chose; and was bound to sue upon a reasonable apprehension of risk. The bill is, in effect, one by a



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trustee on behalf of the children, to obtain payment out of the property of the principal debtor, and the surety need not have been a party ; though the uniting him is not, at least upon the hearing, a matter of objection.

Again ; it is objected by the counsel of the defendant Western, that such a bill cannot be filed, without a judgment at law being first obtained, and an execution issued fruitlessly. This rule of the court, however, never prevails after the decease of a debtor. If there was no judgment in his lifetime, no suit at law is necessary. The creditors come into this court for satisfaction of the demand, and may assail a fraudulent conveyance, so as to render the property assets for the payment of their debts, without any proceedings at law. This was done in *Lush v. Wilkinson*, (5 Ves. 384,) the bill being against the executor, and the widow of the grantee. So in *Kidney v. Coussmaker*, (12 Ves. 152,) in *Holloway v. Millard*, (1 Mad. Rep. 414,) the bill was against executors of a testator and trustees in a settlement, charging that the personal assets were insufficient, and a fraud on the deed. In *Richardson v. Smallwood*, (Jac. Rep. 552,) the suit was instituted by the plaintiff, on behalf of himself and the other creditors of Froom, deceased, for the purpose of setting aside a voluntary settlement made by him. The plaintiff became a creditor in fact, after Froom's death, under a covenant in a lease, granted by the latter. He sued the personal representative of Froom, for a breach of covenant, and recovered damages ; soon afterwards he filed the bill. The subject of the settlement was leasehold property. It was held that the principal debts had not been proven, but there was ground for inquiry as to their existence ; and if proven, that the settlement would be void, and all creditors must be let in. In the case of *Smith v. Comstock*, Sept. 1841, I held that a judgment creditor, who was such at the death of the assignor of a fraudulent conveyance of personal property, might file a bill on his own account solely, and obtain a preference over all others ; in the same manner as if the debtor was living. This decision was chiefly grounded on the *Bank of the United States v. Burke*, (4 Blackf. 141,) and the decision in *Osborn v. Mass*, (7 John. Rep. 181,)

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and *Anderson v. Roberts*, (18 *Idem*, 526.) The case in Indiana went further. The judgment was recovered against the administrator of the fraudulent grantor, and the property was real estate.

Now, at no time would a judgment against executors have been of any avail as to real estate, although a judgment for assets *quando acciderint*, would give a preference when those came to hand; under the revised statutes that privilege is destroyed. (2 *R. S.* 87, § 28.) What possible utility, then, can there be in suing the executors at law, when the judgment will not give priority either as to real or personal estate? It may well be that the personal estate should be shewn to be insufficient; because even a volunteer may have a right to have the admitted assets of the estate first applied. But this is matter of fact merely, and can as well be charged and proven under an allegation of insolvency, or insufficiency, as established by an execution returned unsatisfied. The same remark applies to the objection that the parties devisees should be proceeded against at law, to ascertain that there is no other property liable. Without saying that this would be essential, even where the party died seized of, or devised other property, the matter is one of allegation, as a fact; and a charge of general insolvency would be sufficient, and would save a bill from a demurrer.

It is therefore clear, in my opinion, that a bill may be filed by a creditor, after the death of a debtor who has made a fraudulent assignment, without a judgment against the personal representative or heirs, at least upon a charge of insolvency at his death. But the question is, whether such a bill must not be on behalf of all the creditors, or whether it may be for the sole advantage of the creditor filing it? The case is very different where, as in *Smith v. Comstock*, the judgment was recovered in the assignee's lifetime, and an execution returned unsatisfied. It is perfectly consistent with the privilege of the debtor, that such a creditor should get a preference. His lien had attached upon the property withheld from him, although he was compelled to resort here for relief. Upon a careful consideration of the authorities, I am of opinion that the case in Indiana will not, since the

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revised statutes, apply in this state to a judgment creditor, who obtained his judgment after the party's death. Of course it will not apply where no judgment has been obtained. For in such a case the suit must be on behalf of all the creditors, and will avail for all who could impeach the conveyance. It is said by Lord Hardwick, in *Walker v. Barrows*, (1 *Atk.* 94,) that where a man has died indebted, who, in his lifetime, made a voluntary settlement, upon application to this court to make it subject to his debts, as real assets—the court has always denied it unless it was shown he was indebted at the time. In *Russell v. Hammond*, (1 *Atk.* 13,) the bill was by creditors of William and G. Hammond, deceased, to be relieved from various settlements made after the marriage of William Hammond, and alleged to be fraudulent as against those creditors; seeking that such fraudulently settled property might be sold, and the proceeds applied in aid of the other estates, towards payment of the debts. The master of the rolls decreed a general account of the personal estate of William Hammond, to be applied in payment of the plaintiffs. And all other the bond creditors of William Hammond in a course of administration—the same as to the personal estate of G. Hammond, (of course the personal representatives were parties.) The decree declared, that if the personal estates were not sufficient to pay the plaintiffs, and other bond creditors, then that the settlement made of the leasehold estates was fraudulent, with respect to the creditors, and ought to be set aside; and that such part of the leasehold as was the proper estate of G. Hammond at the time of making such settlement, should be applied in satisfaction of such of his bond creditors as his personal estate should fall short of satisfying. The same directions were given as to so much of the leasehold as was William Hammond's proper estate at the time of the settlement. An account of the rents of the leasehold property received by Elizabeth Hammond was directed, and if insufficient to pay the creditors, then a competent part of the leasehold property was to be sold, and the money applied to pay them. Upon an appeal to Lord Hardwick he said, that what was sought by the creditors was an application of the leasehold

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estate as assets for the payment of their debts. He reversed the decree as to one of the leasehold estates, and affirmed it as to the other. The principle of the decree was therefore sustained.

I look upon this authority as very instructive upon this subject. First, it shows, that the other personal estate of a fraudulent settler ought first to be resorted to next, that a judgment against the testator, or intestate, or the representative, is needless; and lastly, I think it tends to show that the subject matter of the fraudulent settlement, or assignment, becomes equitable assets, and as equitable assets is distributable equally or proportionally. The use of the phrase in a course of administration, when applied to the regular personal estate, and its omission when the direction is given as to the settled estate, is a circumstance of much weight. This point, however, is by no means certain, and it may be that the court in England still regards the priority of the law in distributing legal assets, as applicable to such a case. In our state this priority is now permitted in a few instances only, and all means of giving it among debts of equal degree are abolished.

The cases in South Carolina of *Brockman v. Bowman*, (1 *Hill's Ch. R.* 338,) and *Brown v. McDonald*, (*Id.* 297,) establish the position that no preference can be obtained by one creditor over others, by filing a bill to impeach a fraudulent conveyance. But I think the former case goes too far in holding that the property delivered to the executor should be applied. In *Ainslie v. Radcliff*, (7 *Paige*, 444,) the chancellor adverts to the right of one judgment creditor of the decedent, to obtain a preference over others of the same class, by taking proceedings subsequent to his death; such as suing out execution. I look upon this as strengthening the view taken, that the filing a bill here, upon a judgment, before a party's death, will give a preference.

In *Whittington v. Jennings*, (6 *Sim. Rep.* 493,) S: Tice had a life interest in certain nine shares vested in trustees, with a power of appointing the same to the extent of £760, in such persons as, by deed, or will, he should name. In 1834 he became indebted to the plaintiff in £68, and gave him a warrant of attorney to secure that sum. In 1816, he owed the plaintiff

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£107. And in that year he made a voluntary appointment of the £760 in favor of the defendants; but of this, the plaintiffs had no knowledge, until after Tice's death. Payments were made exceeding the sum due at the date of the appointment, but still the actual balance of debt was increased until it amounted, at Tice's death, to £536. He appointed the plaintiff his executor. The defendants claimed to have the £760 paid to them, and the plaintiff filed his bill to have the appointment declared fraudulent, as against himself and the other creditors, if any. The vice chancellor declared that Tice was insolvent in 1811, and not solvent subsequently, and that the plaintiff was entitled to the £760, as part of the testator's assets. In this particular I apprehend the vice chancellor was wrong. The property might be considered as assets for the payment of debts; and the plaintiff was apparently entitled to his £536, but the surplus could not be taken from the volunteer as assets, unless there were other creditors to be ascertained by an inquiry.

The case of *Shears v. Rogers*, (3 Barn. & Adol. 362,) also deserves notice. The action was debt on bond. A plea of plene administravit præter £106 3 11. The question was, whether a certain lease, agreed to be of the value of £200, was assets in the defendant's hands. After the debt accrued, and the debtor had been threatened with legal measures to recover it, he made a voluntary assignment of the lease in question to the defendant for the use of his daughter-in-law. He continued in possession of the premises till his death, and by his will appointed the defendant his executor. The defendant delivered the deed of assignment to the husband of one of the daughters-in-law. Lord Tenterden said, (and the remark is very pertinent to the present case, on the question of insolvency,) "a man owing £500, and having property to that amount, may render himself insolvent by assigning it over to a third person. There is, undoubtedly, high authority for saying that a party must be in insolvent circumstances to render a conveyance to him fraudulent within the statute; but that must not be understood as importing that a person may not render himself insolvent by conveying his property to a person who is not a creditor. The

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authorities show, that wherever a man makes a gift of goods, which gift is fraudulent and void as against creditors, and dies, he is considered to have died in full possession with respect to the claims of the creditors, and the goods are assets in the hands of his executor."

There are some expressions of the other judges in this case, tending to show that the fraudulent lease was assets at large; and *Bethell v. Stanhope*, (*Cro. Eliz.* 810,) is cited by Justice Taunton as law. Certainly it is not law in our state. It is clearly overruled by *Osborne v. Moss*, (*7 John. Rep.* 161.) I take the expression of Lord Tenterden to show the true state of the law—the goods are assets in the hands of any one who holds them, for payment of the creditors, and in respect of them, but for no one else. Justice Littledale says, "the assignment was void as soon as the creditors claimed to treat it as such, though not until then."

It may be added that if a single creditor files a bill, he gets a decree merely for the payment of his demand in a course of administration. (*Att'y Gen. v. Cornthwaite*, *2 Cox*, 45.) Mr. Bell testified before the English commissioner of 1816, that bills by a creditor of a deceased party not on behalf of himself and all the other creditors are almost disused.

And upon the doctrine of a distribution of assets equally, the late cases of *Mitchelson v. Piper*, (*8 Sim.* 65,) and *Wilson v. Paul*, (*Id.* 63,) are very strong. It was there held, that where an executor had paid a part of a debt, the creditor could not receive any more out of legal or equitable assets until the other creditors were paid proportionably.

The results which I have arrived at in the present case, and in that of *Smith v. Comstock*, are these: That where a creditor has obtained a judgment in the lifetime of a fraudulent assignor, and issued his execution, fruitlessly, he may file a bill after the death of the assignor to set aside the assignment, and will have a preference, whether the assigned property is real or personal, in the same manner as if the debtor had been living. That if the assignor dies before a judgment is recovered, no right of preference can be obtained; and a bill filed for the purpose of

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setting aside the conveyance must be on behalf of the complainant and all others, the creditors of the assignor. This is on the ground that the property fraudulently conveyed remains the property of the grantor as to creditors, though not as to any other persons: and when this court is applied to it will treat such property, according to its favorite doctrine, as equitable assets. The law having now provided that there shall be no legal preference among debtors, except in the case of the United States and for taxes and judgments against the deceased, there is nothing to prevent the application of this doctrine with these exceptions. But the property can be decreed assets only as to creditors. If, by means of the statute of limitations, releases or otherwise, these can be excluded, the voluntary gift will stand, and it will stand as to any surplus after paying admitted creditors.

There can be no question that the conveyance to Mrs. Collins was fraudulent and void. Collins was indebted to his partners, and had been for several years. A judgment had been entered against him for rent in the year 1826, which was never satisfied; and there was the very heavy debt in question of \$7590, for money received by him and spent. He appears to have had no property whatsoever, but the two parcels of land conveyed by him. The evidence respecting his claims under the French treaty is too vague for any reliance. The value of the property, as tested by the sales, was about \$3600; and the remark of Lord Tenterden before noticed is here very appropriate. After the dissolution of the firm, as I understand, he had been in the lunatic asylum, supported by his son; and it cannot be questioned that he died insolvent, and was so in August, 1828, the date of the deeds.

It may be considered as not entirely settled in England, whether any extent of debt short of insolvency will be sufficient to render a voluntary settlement fraudulent. (*See Townsend v. Westacott*, 2 Beavan, 340; *Norcutt v. Dodd*, 1 Craig & Phill. 100; *Shears v. Rogers*, 3 Barn. & Adol. 362; *Bonny v. Griffith*, *Hayes' Exch. R.* 120.) It is not disputed that in this court the judge is the substitute for the jury at common law: and the question is what satisfies him of a fraudulent intention. But he

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also is expressly prohibited by the statute, (2 R. S. 137, § 4,) from saying that the deed is fraudulent, simply because it is voluntary. He is however at liberty to treat a heavy amount of debt as a strong evidence of such intent, and utter insolvency as a proof of insuperable force. Thus I understand the statute, and this view is sanctioned by the explanations of the revisers. They adopted the section as the basis of the doctrine of *Van Wyck v. Seward*, as to creditors, and in order to do away with the severity of *Meade v. Livingston*. They had also in view the abolition of the then existing rule as to subsequent purchasers. While, therefore, I am obliged to pronounce, as a matter of fact, that there was a fraudulent intent in the matter of this conveyance, I am at liberty to give all the weight to other facts which the courts have undeviatingly attributed to them ever since the statute of Elizabeth; and certainly no judge can be found who has not admitted that utter insolvency was enough to establish the fraudulent intention against existing creditors of a voluntary grantor. Whether a court of law can set aside a verdict, or repeatedly set it aside, where the jury find a conveyance free from fraud in a case of palpable fraud in law before the act, is a question it becomes me not to enter upon.

But the more difficult question relates to the rights of the defendant Western. Mr. Western shelters himself under the plea of there being no fraud in the transaction; that a valuable consideration was in fact received by Collins; and next, if that ground fails, that he is a purchaser for valuable consideration without notice.

The first branch of this defence is plainly unsupported. His answer distinctly admits that all the interest on the bond had been duly paid to Mrs. Collins down to the filing of the bill. No debt therefore existed from the husband to the wife, arising out of the account. Then it is said that the husband had received some property given to his wife by her brother's will. There is no proof of this, and the averment is plainly irresponsible.

It does not appear necessary to dwell upon the nature of Mrs. Collins' estate and right, under the conveyance from her hus-



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band, or the operation of the revised statutes upon that estate. It is sufficient to say that the equitable estate was first given to her in fee : and then an absolute power of appointment of the fee by means of a certificate, under which her trustee was bound to convey. If no appointment was made, then it was to go to her heirs. Under the appointing power, therefore, she could direct a conveyance without her husband's joining.

The defendant Western states that, in 1833, he obtained a judgment against Mary Collins for \$326,37, and had also a claim against her amounting to about \$300 ; that Mary applied to him to purchase the property in question—then producing the trust deed to him as evidence of her ownership—that he had no knowledge or notice of any matters other than those expressed in such trust deed, and he entered into a negotiation with Mary for the purchase ; that a partial bargain was made, and afterwards reduced to writing, and duly recorded before the filing of the bill, and in pursuance thereof the defendant, on the 8th of April, 1833, paid to her \$1400 in cash, and executed a satisfaction piece of the judgment, and a discharge of the other debt, and took from her a full and absolute conveyance of the premises. He states that Edward H. Collins and John Anthon knew of the contract in time to have given him notice ; but of this there was no proof. He adds that he has tendered the certificate to the trustee and required a release, but that the trustee has refused to execute the same.

The defendant had been the counsel of Mrs. Collins, and had so far dealt with her as to have become entitled to his judgment and the debt of \$300. His answer in strictness denies notice only at the time of the negotiation, not when the money was paid ; but as he denies the fraud entirely, and also the insolvency, I may, perhaps, consider this difficulty removed, and that the assertion is, he knew nothing of the facts constituting the fraud, when the transaction was consummated. He had, however, the trust deed in his possession, and of course is charged with knowledge of every thing in it.

That deed showed that the consideration was nominal, and the conveyance a voluntary one by a husband to his wife.

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It showed that there was a trustee, and that upon her certificate he was to convey. The question is whether the defendant, being clearly chargeable with notice of the deed being voluntary, is not chargeable with the duty of inquiring whether it was made in a state of insolvency, and into all the facts connected with it.

In *Sigourney v. Munn*, (7 Conn. Rep. 333,) the law is well expressed by Chief Justice Hosmer. "Whatever is sufficient to put a person on inquiry is considered in equity as conveying notice; as the law imputes to a person the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprised him. Holbrook, who must be presumed to have read this writing, could not fail to observe its peculiarities, to have his attention awakened by them, and to see the path which would conduct him to a full knowledge of the plaintiff's rights."

In *Kennedy v. Green*, (3 Myl. & Keen, 699,) some suspicious circumstances appeared upon the face of a deed under which the defendant claimed. The master of the rolls said, "the perusal of the deeds would have led every man of business to the conclusion that there was something irregular, and the nature of the transaction would therefore have induced an inquiry which, if pursued with reasonable diligence, would have led, by reference to the plaintiff, to a full knowledge of all the circumstances."

Upon a rehearing before Lord Brougham, he said: "The principle is quite undeniable, and that whatever is notice enough to excite attention and call for inquiry, is also a notice of every thing to which it is afterwards found such inquiry would have led, although all was unknown for want of the investigation."

See further, *Taylor v. Baker*, (Dan. R. 79;) *Booth v. Barnum*, (9 Conn. R. 289;) *Hawley v. Cramer*, (4 Cowen, 717;) *Green v. Slayter*, (4 John. Ch. 47;) *Pendleton v. Fay*, (2 Paige, 204.) Now in the present case, how slight an inquiry must have led to the knowledge of Collins' insolvency? An inquiry of Edward K. Collins to whom the deed of settlement led him, would have shown that his father had been in the asylum; had

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been supported by him, and was utterly insolvent at the dissolution of the firm, in May, 1830; and he would have been led to the inquiry whether he was also insolvent at the date of the deed, in August, 1828.

Again, the defendant's witness, Boardman, says that in a conversation between Mrs. Collins and the defendant, she said he had fairly bought the land at her repeated request, when no other person would take the title she could give. I may say in the language of Sir William Grant, (7 *Ves.* 170,) "It was not necessary to use any exertion to obtain information, but merely not to shut his eyes against the information which, without extraordinary neglect, he could not avoid receiving."

There are two cases, however, deserving notice upon this head, (*Kenny v. Brown*, (3 *Ridg. P. C.* 462,) and *Coleman v. Cocke*, (6 *Ham.* 618.) In the former an attorney was employed to sue for his client, and having filed a bill obtained a decree for certain lands and deeds, and for an account of rents; he then obtained from his client, by fraudulent statements and imposition upon a very ignorant man, a lease of the property forever, at a rent of £36. The lease recited the consideration to be the many services done, and obligations conferred, upon the lessor by the lessee. Upon the lessee's marriage, he settled the property to the use of his intended wife after his death, and then in tail male. Afterwards a bill was filed to set aside the grant, on the ground of fraud. This was abundantly made out, and the decree set the settlement aside as to the attorney's life estate. The chancellor, Lord Fitzgibbon, added, "I entertain some doubts whether the nature of the original transaction was not such as necessarily led to notice of the frauds committed by him, more particularly as the grant, and the consideration of it, are recited in the settlement. However, I think that it would be going too far to determine that the recital of a fact in a deed, which might, or might not, according to circumstances, be held in a court of equity, to amount to a fraud, would of necessity affect a purchaser for a valuable consideration denying actual notice of fraud. Wherefore I did not feel at liberty to go beyond the party's life estate."

From the course of reasoning, in this case, it is plain the

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court held, that the grant was not *per se* fraudulent, as being made to an attorney, but was so from the extraneous circumstances of the fraudulent practices; nor did it appear on the grant that the connexion had not ceased. Still the authority is of much weight in favor of the defendant.

In *Coleman v. Cocke*, a father had made purchases of property, and paid or secured the purchase money himself, and directed the conveyances to be made to his son, who never paid any thing. These conveyances were set aside by creditors of the father; but a conveyance to a third person was upheld under the following circumstances: The father had procured the deed to be made to his son William A. Bentley. I presume the valuable consideration actually paid, was stated in the deed. In 1807, William A. Bentley conveyed a parcel of the property, amounting to 600 acres, to his brother Peter E. Bentley, in consideration of one dollar. Then in 1813, Peter E. Bentley conveyed to Coleman part of the tract of 600 acres, for a valuable consideration. Notice of the fraud in Coleman, was charged, but fully denied in the answer, and unsupported by evidence. This deed was sustained on appeal.

This cause is clearly distinguishable from the present. The son, William A. Bentley, appeared on the deeds, the lawful owner. He conveyed to Peter by a voluntary deed, it is true, but that might have raised a question with Peter's creditors, but could not lead to any supposition that the father's creditors were defrauded. Therefore there was nothing in the force of the instruments creating a suspicion stimulating inquiry.

It strikes me that the protection of creditors against fraudulent voluntary deed, imperatively requires the adoption of the rule that the purchaser from a voluntary grantee, the wife or child of the grantor, is bound, by the knowledge of the deed being voluntary, to inquire into the situation of the grantor at the time of its execution; and if the grantor was then openly insolvent, and an inquiry with ordinary prudence would have disclosed the fact, he cannot shelter himself under his purchase. Mrs. Collins was made a party to the bill, to reach the avails of the other parcels of property sold by her; and to apply

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it to her interest in the bond. She has died, and the complainants are content not to seek any relief against her estate, if there is any. I do not see any necessity for bringing her personal representatives or devisees into this court.

I do not consider that the personal representative of Israel G. Collins was a necessary party; but the bill was not demurrable for making him so. I think that in these cases the personal representative or heir of a fraudulent grantor need not be a party, where there is a charge of insolvency. If the grantee, or a purchaser under him, sets up a sufficiency of estate, besides the subject of the grant, it may, perhaps, be necessary to bring them in. I do not mean to say that even in such a case, this is essential.

The result is, that the bill must be amended, by making it on behalf of the complainant, and all the creditors who may come in and contribute. A reference must be directed, to call in the creditors of Israel G. Collins, to prove their claims; the master to state the nature and priority of the debts, proved before him, according to the provisions of part two, title three, chapter six, article two, of the revised statutes.

The decree must declare that the conveyance by Mary Collins to the defendant Henry M. Western is void, as to the complainants and all other the creditors of Israel G. Collins, whose debts shall be proved before and allowed by the master.

The costs of the infants, and of the public administrator, to be allowed to the date of the decree; no future costs to be allowed them, as their interference in the suit will be unnecessary. The question as to the costs of the other parties is to be reserved until the coming in of the report.

*H. M. Western*, for the appellant.

*J. Anthon*, for the complainants.

*J. Blunt*, for the infant defendants.

**THE CHANCELLOR.** Several questions were raised and disposed of by the assistant vice chancellor, which it is not neces

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say now to consider, in consequence of the conclusion at which I have arrived, that the defendant Western is entitled to protection as a bona fide purchaser without notice of the fraud, if any there was, in the conveyance of August, 1828, to E. K. Collins in trust. Nor is it now necessary to consider the question, whether the assistant vice chancellor was authorized, at the hearing of the cause, to allow the complainants to amend their bill, in a part which he deemed essential, and at once to proceed to a decree; without giving to the appellant an opportunity to answer the new case made by such amendments.

The bill, among other things, charges that the title of Western to the premises is fictitious, and was created without any valuable consideration; with a view to defeat the rights of the complainants. And it calls upon him to set forth the nature and origin of his title, what he paid for the same, and whether the same was not made to defeat the complainants' rights in the premises. His answer is, therefore, directly responsive to the bill, and as it is not disproved, but on the contrary is sustained by one witness in its material parts, it is evidence in his favor of the facts contained therein, in respect to his title and the consideration thereof. He denies that the conveyance to him from Mrs. Collins, was without consideration, or that it was made in trust for her, or that she was to receive any benefit therefrom, by any agreement, express or implied, between her and him; but on the contrary, he insists that the conveyance to him was for his own use and benefit. He also states particularly what the consideration was, and how it was paid; that he had a judgment against her, which was a lien upon her interest in the property, to the amount of \$326, and another debt against her of \$300, for which he held a lien upon valuable papers in his hands; that she applied to him to purchase the premises in the fore part of April, 1833, after the death of her husband, alleging that she was the owner thereof; that she produced to him the original trust deed, as the evidence of her right to sell the premises; and that he had no notice of the matters charged in the complainants' bill, except so much thereof as appeared upon the face of the trust deed. He further states that he thereupon

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contracted with her for the purchase of the premises, and paid her therefor \$1400 in cash, and paid the residue of the consideration by discharging his judgment against her, and the debt of \$300, at the same time giving up the papers upon which he had a lien for such indebtedness; and that she then gave to him a full and absolute certificate entitling him to the property according to the terms of the trust deed, and also a full and absolute conveyance from her of the premises, under which he insists that he is the legal as well as the equitable owner of the property. He also denies that the grantor, in the deed of trust, was insolvent, or that such deed was voluntary and without consideration, according to the best of his information and belief. The answer therefore contains a substantial denial of all knowledge of the complainants' equitable rights, or that the first deed was fraudulent and void, as against the creditors of the grantor, at the time the defendant paid the purchase money and obtained his title to the premises.

The assistant vice chancellor appears to have based his decree upon the erroneous supposition, that the fact that the consideration mentioned in the deed of trust was merely nominal, was constructive notice of the fact that the grantor was insolvent; and that the conveyance was made for the purpose of defrauding the creditors of such grantor. In other words, that there cannot be a bona fide purchaser from a person who is entitled to property by deed of gift, or by a voluntary settlement, in case it afterwards turns out that the grantor was indebted to such an extent that the conveyance, or voluntary settlement, would operate as a fraud upon his creditors. This, however, is not a correct exposition of the law upon this subject. The law sanctions a conveyance founded upon the consideration of blood or of marriage merely. The legal presumption therefore is, that such a conveyance is valid, and not a fraud upon the rights of any one. And the mere fact that the purchaser, from the holder of such a title, has notice that it was not founded upon a pecuniary consideration, is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent. On the contrary, he has a right to act upon the legal presumption

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that such a deed of gift, or voluntary settlement, was honestly made; until some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance was intended to defraud some one. In the present case, there is some evidence which renders it at least probable that I. G. Collins was not able to pay all his debts, in August, 1828, when the trust deed was executed; especially if he had no property except his interest in the firm in which his son was a copartner, and had no capital in that firm. But there is not a particle of evidence in this case that Western, who purchased of Mrs. Collins five years after that time, was acquainted with her husband, in his lifetime, or with his circumstances in 1828; so as to make it his duty to inquire whether I. G. Collins, or his son who was the grantee in the deed of trust, had not intended to commit a fraud upon the creditors of the former, by the execution of this deed in favor of the wife.

The only remaining inquiry therefore, is, whether the appellant acquired the legal title to the premises in question, so as to entitle him to protection as a bona fide purchaser without notice. The legal title, in 1828, and under the law then in force, was vested in E. K. Collins, the trustee; and the cestui que trust, or her grantee, previous to 1830, would only have had an equitable interest in the property. But upon a careful examination of the provisions of the revised statutes, I think the appellant acquired the legal title to the premises, under the conveyance from Mrs. Collins in April, 1833. The deed of 1828 conveys the premises to the trustee upon a mere naked trust; in the first place, for the use and benefit of Mary Collins and her heirs and assigns forever. It then contains the further trust that the trustee shall convey the premises to such person or persons as she shall by will, or by her certificate in writing, during her life, and after the death of her husband, designate; and if no such last will and testament shall be made, or certificate given, then to convey the premises to her heirs, after her death. The trustee, then, even before the revised statutes, held the premises as a mere naked trustee of the legal estate; and with a bare power to convey to her devisee, grantee, or heirs, either during her life or afterwards. I think, therefore,



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that the equitable interest of Mrs. Collins was turned into a legal estate in fee, in the premises, by the operation of the forty-seventh section of the article of the revised statutes relative to uses and trusts; (1 *R. S.* 727;) especially after the death of the husband. That section provided that every person who by virtue of any grant, assignment or devise, then was, or thereafter should be, entitled to the actual possession of lands, and to the receipt of the rents and profits thereof, in law or in equity, should be deemed to have a legal estate therein; of the same quality and duration, and subject to the same conditions, as his beneficial interest. The next section, however, declared that the preceding section should not divest the estate of any trustees in any trust then existing, where the title of such trustees was not merely nominal, but was connected with some power of actual disposition or management, in relation to the lands which were the subject of the trust. The object of this last section undoubtedly was to preserve the legal title in the trustees, in trusts which had already been created, wherever and so long as the continuance of such legal title in them was necessary to carry into effect any of the objects of the trust; and where such objects could not be carried into effect if the whole legal title was immediately vested in the cestui que trust. Although the whole beneficial interest in the trust property in this case, therefore, belonged absolutely to Mrs. Collins, with the single exception that she could not alienate the same during the joint lives of herself and her husband, without his consent, as well as by the concurrence of the trustee, there does not appear to have been any active trust, or power of disposition, which was necessary to be performed by the trustee, after the revised statutes went into operation; except the power in trust to convey the legal title to the devisee of Mrs. Collins, in case she died before her husband. And it is even doubtful whether the cestui que trust would not have had the right to devise the premises during the life of her husband, so as to vest the legal title in her devisee without any conveyance from the trustee; under the provisions of the revised statutes relative to powers, in connection with the operation of the forty-seventh section of the article relative to uses

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and trusts. That last mentioned section provides that the cestui que trust shall have a legal estate in the land, of the same quality and duration, and subject to the same conditions, as his beneficial interest therein. Here one quality of the beneficial interest of the cestui que trust was that she had the power to dispose of the property, by devise, notwithstanding her coverture. Such a power, by the express terms of the article of the revised statutes relative to powers, may be given to a married woman; to enable her to dispose of her freehold estate by deed or will without the concurrence of her husband. (1 R. S. 732, § 80. *Idem*, 735, § 110.) But even if the continuance of the legal estate in the trustee, in this case, was necessary for any purpose during the life of the husband of the cestui que trust, she became absolutely entitled to the land, for all purposes, upon the death of her husband. And the estate to which she was then entitled in equity, under the provisions of the trust deed, was an absolute right to the possession of the property, and to the receipt of the rents and profits thereof; with a right to dispose of the same to any person, by deed or will. And in case she had died without will, and without aliening it in her lifetime, it would have descended to her heirs at law; in the same manner as if the legal title had been conveyed to her at the time she acquired her equitable interest in the property by the deed of trust. She had therefore the whole legal title, when the appellant made his purchase. And he obtained such title by her deed to him in April, 1833, and before the commencement of this suit; which suit appears to have been the first information that Western had of the claim that the trust deed of August, 1828, was intended to defraud creditors. Since the reversal of Chancellor Kent's decision in the case of *Roberts v. Anderson*, by the court of dernier resort, (3 *John. Ch. Rep.* 372, 18 *John. Rep.* 515, S. C.) it is no longer an open question, in this state, that a bona fide purchaser of property, from a previous grantee to whom it had been conveyed for the purpose of defrauding creditors, is entitled to protection against the claims of the creditors who were intended to be defrauded by the first conveyance. And the appellant in this case being a bona fide purchaser, and entitled

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to such protection, the decree appealed from must be reversed; and the complainants' bill must be dismissed with costs, both upon this appeal and upon the proceedings in the original suit, to be taxed. And as a necessary consequence of this decision, the complainants must pay the costs of the guardian ad litem of the infant defendants, who have been brought before the court as parties to this suit.

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 NORTH vs. NORTH.

[Followed, 10 Abb. N. S. 74, 78; 41 How. 169, 172; 59 Id. 42, 43. Recited and applied, 50 N. Y. 184, 190. See 59 How. 27.]

In suits for divorce the allowance for *ad interim* alimony, and for the expenses of defending the suit, is not confined to cases in which both parties admit the original marriage to have been legal.

But where the wife files a bill, against her reputed husband, to annul the marriage on the ground of impotence, or for any other cause which goes to the legality of the marriage originally, *it seems* the allegations in her bill will be taken to be true, as against herself; when she applies for an allowance for alimony, or for expenses.

Where the husband files a bill against his reputed wife, admitting that he was in fact married to the defendant, but alleging such marriage to have been illegal, or void, if the facts stated in the bill, on which the supposed illegality, or invalidity, of the marriage depends, are denied by the defendant, on oath, she is entitled to *ad interim* alimony, and to an allowance for the expenses of the suit.

The allowance for *ad interim* alimony does not depend wholly upon the statute, but upon the practice of the court as it existed before the statute.

Where a husband files a bill against his wife, to annul the marriage, upon the ground that she had another husband living at the time of her marriage with him, which fact is denied by the defendant, in her answer, she is entitled to *ad interim* alimony, and to an allowance from the complainant to enable her to defend the suit.

THIS case came before the chancellor, the office of vice chancellor of the sixth circuit, where the suit was pending, being vacant; upon an application by the defendant for an allowance, to enable her to defend the suit, and for the support of herself and child during the litigation. The bill was filed by the husband to annul his marriage, with the defendant, upon the alleged

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ground that she had another husband living at the time of such marriage.

*W. G. Angel*, for complainant. Alimony and expenses in this cause ought not to be allowed. 1. There is no case on record, in this state, where a bill has been brought for a divorce on the ground that a former husband, or wife, of the defendant was living at the time of the last marriage, in which alimony has been allowed to the wife. 2. If the defendant had another husband living at the time of her marriage with the complainant, the last marriage is null and void, and the complainant is not under any legal obligation to support her; nor under any moral obligation to supply money for her defence. (2 R. S. 76.) 3. The complainant is poor, and not able to furnish money for the defendant's support, and for her expenses in defending the suit. 4. By directing the payment of her expenses, and alimony to the defendant, this court would lend its influence in supporting a contract that was null and void *ab initio*, and a violation of public policy.

*R. Loyd*, for the defendant. The bill alleges that the defendant, at the time of her marriage with the complainant, was the wife of Henry Colter, and that the complainant was induced to marry her by the fraud and connivance of the defendant. The petitioner denies that Colter was alive at the time of her marriage with the complainant, but states that he was dead; and she denies all fraud or connivance to induce the complainant to marry her. In her petition the defendant asks for alimony, and for an allowance for expenses sufficient to enable her to make her defence. The method of procuring alimony and expenses is by petition. (See 2 *Barbour's Ch. Prac.* 268.) An allowance is almost a matter of course where the defendant denies all guilt charged in the bill. And the court will not try the question of guilt or innocence on a motion like this. (*Id.* 265, 268. *Wood v. Wood*, 2 *Paige*, 109.) The defendant must show, in her petition, a defence to the complainant's bill. (*Osgood v. Osgood*, 2 *Paige's Rep.* 621.) This has been done in the present case.

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Where the husband is complainant his poverty will not protect him. He must conform to the rule, or abandon his suit. (*See 2 Barbour's Ch. Prac.* 266.)

**THE CHANCELLOR.** The affidavit of the defendant denies the fact, charged in the bill, that her former husband was living at the time of her intermarriage with the complainant. For the purposes of this application, therefore, the fact of marriage is admitted; and the presumption is that it was legal, until the contrary shall have been established by the proofs in the cause. Besides, it appears by the bill itself that the parties continued to cohabit together, as husband and wife, until the spring of 1845; although the complainant admits that he was informed in the summer of 1844, that the former husband of the defendant was living when the marriage with the complainant took place, in 1840. And if the former husband was dead at the time of this subsequent cohabitation, the court may infer an agreement of these parties to live together as husband and wife after his death; so as to constitute a valid marriage between them at the time the present bill was filed. (*Rose v. Clark*, 8 *Paige's R.* 574. *Matter of Taylor*, 9 *Idem*, 611.) It does not follow, therefore, that the complainant will be entitled to a decree, dissolving the marriage between him and the defendant, even if he should succeed in proving that the former husband of the defendant was alive, in July, 1840; when the ceremony of marriage between the present parties took place.

The counsel for the complainant is under a mistake in supposing that the allowance for ad interim alimony, and for the expenses of defending the suit, is confined to cases in which both parties admit the original marriage to have been legal. It is true, that where the wife files a bill against her reputed husband, to annul the marriage upon the ground of impotence, or for any other cause which goes to the legality of the marriage originally, the allegations in her bill will be taken to be true, as against herself, when she applies for an allowance, out of the husband's estate, either for alimony or for the expenses of the litigation. But the practice is otherwise where the husband files

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a bill against his reputed wife; admitting that he was in fact married, to the defendant, but which marriage he alleges to have been illegal or void. In such cases, if the facts stated in the complainant's bill, upon which the supposed illegality or invalidity of the marriage depends, are denied by the defendant upon oath, either positively or upon her information and belief, she is entitled to ad interim alimony, for her support, until the truth or falsehood of the allegations in the complainant's bill can be ascertained by the proofs; and also to a reasonable allowance, out of his property, to enable her to make a proper defence to the suit. (*Poynter's Mar. & Div.* 247.) It is true, the provision of the revised statutes, on the subject of an allowance to the wife to enable her to carry on the suit, is confined to suits brought for a divorce or a separation; and does not in terms extend to the allowance of ad interim alimony, even in those cases. (2 *R. S.* 148, § 56.) But by referring to the reviser's note to that provision, it will be seen that the allowance does not depend wholly upon the statute, but upon the practice of the court as it previously existed. And even subsequently to that statute, this court has continued to allow ad interim alimony, in matrimonial cases, in the same manner as before. Ayliffe says, a husband, regularly speaking, is bound to allow his wife alimony pending the suit, whatever the cause may be. Poynter also lays down the rule generally, that in all suits of divorce, or suits for the restitution of conjugal rights, or in suits of nullity if the nullity be promoted by the husband, as soon as the court is judicially informed that a fact of marriage has taken place, it is competent for the wife to apply for alimony pending the suit. (*See also 1 Ought. Ordo Judic.* 306, tit. 206.) The precise question now under consideration, came before Sir George Lee, in the Arches Court of Canterbury, as early as 1753, in the case of *Bird v. Bird*, (1 *Lee's Eccl. Cas. by Phill.* 209;) and was decided in favor of the wife. In that case the husband brought a suit against the wife, to annul the marriage, on the ground that she had another husband living at the time of her marriage with the plaintiff. This fact being denied by the wife, she applied for an allowance to enable her to defend the suit. It was granted to

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her accordingly; although the plaintiff insisted she was not his lawful wife, and that he was not bound to bear the expenses of her defence. And it appears by a subsequent report of the case, that she was afterwards allowed £20 for her support pending the litigation, and a further sum for the expenses of the hearing of the cause; which last sum, together with the arrears of her alimony, the court directed to be paid to her before the cause should be heard. (*Idem*, 572.) A similar decision was made in the same court, in 1818, in the case of *Smith v. Smith*; where a bill was filed, by the committee of the husband, to annul a marriage; on the alleged ground that the husband was a lunatic and incapable of contracting a valid marriage at the time the marriage in fact took place. And though fraud in procuring the marriage was imputed to the defendant, the court refused to proceed in the cause until the committee of the husband should furnish the wife with funds, to enable her to make her defence to the suit. This last decision was followed by Sir Christopher Robinson, in the consistory court of London, eight years afterwards, in the case of *The Earl of Portsmouth v. The Countess of Portsmouth*, (3 *Addams' Eccl. Rep.* 53;) where the marriage was also sought to be annulled on the ground of the alleged lunacy of the husband at the time it took place. The first of these cases was more than twenty years previous to the revolution, and shows what was the settled law on the subject at that time. The defendant is, therefore, entitled to an allowance from the complainant to enable her to make her defence, and to a further sum for the support of herself and her child pending the litigation.

An order must be entered, with the clerk of the sixth circuit, directing the complainant to pay to the defendant, or her solicitor, twenty dollars within twenty days, to enable her to put in her answer and put the cause in readiness to take testimony; twenty dollars more when the cause is in readiness to take testimony therein; and twenty dollars when the cause is in readiness for hearing. And all proceedings on the part of the complainant must be stayed, after the said sums respectively become payable, until the same shall have been paid. It must also be referred to a master, in the county of Allegany, to inquire and report

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what will be a reasonable allowance for the support of the defendant, and her child, from the time of the commencement of this suit, to be paid quarter yearly. And the order must direct, that upon the coming in and confirmation of the master's report, the defendant pay to her, or to her solicitor, the amount as fixed by the master, up to the date of his report, within twenty days; and that he pay the further allowance quarterly, from the date of such report, within twenty days from the end of each quarter; with liberty to either party to apply to increase or diminish such allowance, from time to time, as a change of circumstances may require

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PENNIMAN & WICKS vs. NORTON.

[Not followed, 6 Fed. Rep. 61.]

Where, upon an application by the complainants, in a creditor's suit, for leave to proceed against the surviving defendants, after the death of a co-defendant, it was shown by affidavit that all the judgment debtors were insolvent at the time the bill was filed; *Held* that this afforded no excuse for proceeding in the cause without bringing before the court the representatives of a deceased defendant; and the assignee in bankruptcy of some of the other defendants, who had been decreed to be bankrupts subsequent to the commencement of the suit.

*Held also*, that if the surviving defendants had no property, or effects, which could pass to their assignee in bankruptcy, subject to the complainant's lien thereon, or if the deceased defendant had no interest in any property, which could pass to his personal representatives or heirs, subject to such lien, the fact should be distinctly shown, by affidavit; in order to excuse the complainants from bringing such assignees, or representatives, before the court.

If a person declared a bankrupt, against whom a creditor's bill had been previously filed, has an interest in any property, at the time the decree in bankruptcy is made, it passes to the assignee, subject to the complainant's claim thereon. And if such suit is to be further proceeded in, for the purpose of settling the complainant's right to satisfaction out of such property, the assignee in bankruptcy is a necessary party.

A suit upon a creditor's bill cannot be further proceeded in against a defendant, after he has obtained a regular discharge as a bankrupt; unless the complainant intends to contest the validity of such discharge, for the purpose of obtaining a personal decree against the bankrupt. And where the complainant wishes to contest the validity of the discharge, his proper course is to file a supplemental bill; stating the



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commencement of the original suit, the subsequent decree in bankruptcy, the discharge of the bankrupt, and the facts upon which the discharge is claimed to be void and inoperative; and making the assignee in bankruptcy, as well as the bankrupt himself, a party to such bill.

But if the complainant merely wishes to proceed against the property, which has passed to the assignee in bankruptcy subject to his prior claim thereon, he must revive the suit against the assignee alone; stating the discharge of the bankrupt as a ground for proceeding no further in the suit against him, as a party.

Where the assignee in bankruptcy has sold all his interest in the subject matter of the litigation, before the commencement of the proceedings to revive and continue the suit, that fact should be shown; and the purchaser should, in that case, be made a party to the suit, instead of the assignee in bankruptcy.

THIS was an application, on the part of the complainants, for leave to proceed in this suit against the surviving defendants, notwithstanding the death of McNeil, one of the original defendants. The bill was filed in 1840, against Norton, Bartle and McNeil, three of the defendants, as the judgment debtors of the complainants, and against Dickinson and Halliday, the other two defendants, as fraudulent assignees of such judgment debtors; to obtain satisfaction of the complainant's judgment out of the property of such judgment debtors which could not be reached by execution, and to set aside the assignment, as being fraudulent as against the complainants. After the putting in of the answer of the defendants, and the filing of a replication to the same, McNeil died; and Norton and Bartle, the other two judgment debtors, were duly discharged under the bankrupt act. A receiver had been appointed in another suit, in September, 1840, to whom the judgment creditors had made a general assignment. And subsequent to the death of McNeil, and after the decree in bankruptcy as to the other two judgment debtors, a decree was made, in a third suit, against the surviving defendants; by which decree the assignment to Dickinson and Halliday was declared to be void, and a receiver was directed to be appointed, as to the assigned property in their hands.

*W. D. White*, for the complainants.

*N. Hill Jun.*, for the defendants. The suit has never been revived against the assignees in bankruptcy; and we hold that

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further proceedings cannot be had in the cause until that is done. To avoid this objection the complainants, in their affidavits, state that these defendants, in 1840, made an assignment to a receiver in another suit. This does not obviate the difficulty. For the defendants still retained an interest in their property, although it was assigned to a receiver; and that interest, when they were declared bankrupts, vested, by reason thereof, in their assignees in bankruptcy. The assignees being vested with the property, should be made parties. Again; the suit should be continued against the heirs and personal representatives of McNeil; because a portion of the property which these complainants are seeking to reach belonged to McNeil individually, and that cannot be reached by the complainants through the survivors of McNeil. By continuing the suit against the survivors only, they have not all the parties, in whom the fund is vested which they are trying to reach in this suit, before the court.

The suit should not continue against the survivors of McNeil only; because a portion of the fund, sought to be reached, belonged to him individually, and therefore his heirs and personal representatives are necessary parties; the fund consisting of real as well as of personal property.

THE CHANCELLOR. Although it is stated, in the affidavit upon which this application is based, that all the judgment debtors were insolvent when the bill in this cause was filed, that affords no excuse for proceeding in the cause without bringing before the court those who have subsequently succeeded to their rights, in the property which they had at the commencement of the suit. If the defendants Norton and Bartle had no property, or effects, which could pass to the assignee in bankruptcy, subject to the claim of the complainants to an equitable lien thereon, by the previous commencement of this suit, or if McNeil had no interest in any property or effects which could pass to his personal representatives or heirs, subject to such lien, the fact should have been distinctly stated in the complainants' affidavit; to excuse them from bringing the assignee in bankruptcy before the court, in the one case, or the represent-

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atives of McNeil, in the other. For if the person declared a bankrupt, against whom a creditor's bill had been previously filed, has any interest in property at the time the decree in bankruptcy is made, that interest passes to the assignee ; subject to the complainants' claim. And if the suit is to be further proceeded in, for the purpose of settling the complainants' right to satisfaction out of such property, the assignee in bankruptcy appears to be a necessary party to the suit. Nor can the suit be further proceeded in against the bankrupt himself, after he has obtained a regular discharge ; unless the complainants intend to contest the validity of such discharge, for the purpose of obtaining a personal decree against the bankrupt for so much of the debt and costs as cannot be obtained from the property which he had before the decree in bankruptcy was made. For the assignee in bankruptcy, in such a case, has the right to resist the complainant's claim to the property, which has passed to him, under the decree in bankruptcy, subject to such claim ; and to make such defence to the suit as the bankrupt himself could have made previous to such decree. And as the bankrupt may claim the benefit of his discharge, in opposition to the complainant's allegation that it has been fraudulently obtained, the proper course for the complainant is to file a supplemental bill ; stating the commencement of the original suit, the decree in bankruptcy by which the interest of the judgment debtor became vested in the assignee, subject to the complainant's claim, the subsequent discharge of the bankrupt, and the facts upon which that discharge is claimed to be void and inoperative. And the assignee, as well as the bankrupt, should be made a party to such bill. Or if the complainant merely wishes to proceed against the property which has passed to the assignee in bankruptcy subject to his prior claim thereon, he should revive the suit against the assignee alone ; stating the discharge of the bankrupt as a ground for proceeding no farther in the suit against him as a party. And where the assignee in bankruptcy has sold all his interest in the subject matter of the litigation, before the commencement of the proceeding to revive and continue the suit, that fact should ha

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stated. And the purchaser should in that case be made the party to the suit, instead of the assignee.

If the judgment debtors, in the present case, had no property whatever at the time of the commencement of this suit, and the whole object of the suit was to reach the property which had been fraudulently assigned to the defendants Dickinson and Halliday, the complainants would probably have the right to proceed against those two defendants alone; upon a proper supplemental bill, stating that fact, in connection with the previous proceedings in the suit, and the subsequent death of one of the defendants and the discharge of the other two under the bankrupt act, and also stating the fact that the property assigned to Dickinson and Halliday was wholly insufficient to pay the previous liens thereon. Such statements would show that neither the judgment debtors, nor those who had succeeded to their rights, could in any event be entitled to a part of the assigned property, under the clause of the assignment which provided for a re-assignment of the surplus of the assigned property, if any there should be.

The complainants' application must be denied, with \$10 costs; but without prejudice to their right to file such a bill, to revive and continue the proceedings, as they may be advised is proper under the circumstances of this case, and the facts as they actually exist.

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JONES vs. STIENBERGH and others.

**A** person who sells a bond and mortgage for less than the amount due thereon; and actually guaranties the payment of the whole debt, is liable to be made a party to a bill of foreclosure in this court; and the complainant may have a decree over against him for the deficiency, if any there be, to the extent of the money paid on the sale, with legal interest thereon.

**A** person who has secured the payment of a part of the mortgage debt, by his personal obligation, is within the equity of the provision of the revised statutes authorizing the court of chancery to make a decree against a third person who is liable for the mortgage debt; and may be decreed to pay the deficiency, if the

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mortgaged premises do not sell for sufficient to pay so much of the debt as he has guarantied the payment of, and including the costs of foreclosure and sale.

Form of the decree in such a case, where the mortgagor is himself a party to the suit, and is primarily liable for the payment of the deficiency, and where a third person is made a party defendant, who is only secondarily liable for a part of the mortgage debt.

THE bill in this cause was filed to foreclose, and obtain satisfaction of, a bond and mortgage for \$3000, and interest, given by the defendant Stienbergh, to his co-defendants J. G. Fellers and George Fellers, and subsequently assigned by the mortgagees to the complainant, for the consideration of \$2800 only; with a covenant, on the part of the assignors, that the whole \$3000 and interest, secured by the bond and mortgage, should be paid to the assignee, when it became payable according to the condition of such bond and mortgage. The bill alleged that the mortgagor made default in the payment of the bond and mortgage, whereby the covenant of the assignors was broken. The complainant therefore prayed for the usual decree for a foreclosure, and a sale of the mortgaged premises; and for a decree over against the assignors for so much of the deficiency as the amount raised upon the master's sale, exclusive of costs, should be less than the consideration paid to them, upon the assignment of the bond and mortgage, with the interest thereon. But it was not stated in the bill, which was taken as confessed by all the defendants, at what time the assignment was made and the consideration thereof received by the assignors.

*S. M. Woodruff*, for the complainant.

THE CHANCELLOR. It is now settled, by the decision of the court of dernier resort, that a person who advances money upon the sale of a bond and mortgage, or other chose in action, may secure to himself the right to the absolute return of his money and legal interest thereon from the vendor, without the possibility of loss, and the contingent right to recover a much larger sum, from the person who is primarily liable for the payment of the bond and mortgage, or chose in action purchased,

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without violating the statute of usury. It therefore becomes necessary to determine the question, whether the vendor who sells a bond and mortgage for a sum which is less than the amount due thereon, and actually guaranties the payment of the whole debt, is liable to be made a party to a bill of foreclosure in this court; and to have a decree over against him for the deficiency, or for any part thereof. The statute provides, that where the mortgage debt is secured to be paid by the obligation, or other evidence of debt, of any other person besides the mortgagor, the complainant may make such person a party to the bill; and that the court may decree payment of the balance of the debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases. (2 R. S. 191, § 154.) And under this statute it has been settled that the assignor of the bond and mortgage, who has guarantied the payment thereof to the assignee, may be made a defendant in a foreclosure suit, commenced by the latter; and may be decreed to pay the deficiency, as a person who, by his obligation, has secured the payment of the mortgage debt. (*Bristol v. Morgan and Wilkes*, 3 Edw. Ch. Rep 142.) In the case under consideration, the defendants who assigned the bond and mortgage, did, in terms, covenant to guaranty the payment of the whole amount of the mortgage money with interest; though for the purpose of taking the case out of the statute of usury, the court for the correction of errors holds that they are not legally bound, by their guaranty, to pay the whole amount which they covenanted should be paid. Still, that court holds that they are liable as guarantors, for the payment of the bond and mortgage, to the extent of the money advanced to them by the assignee, with the legal interest thereon. And a person who has secured the payment of a part of the mortgage debt, by his personal obligation, is clearly within the equity of the statute; and may be decreed to pay the deficiency, if the mortgaged premises do not sell for sufficient to pay so much of the debt as he has guarantied the payment of, with the costs of foreclosure and sale.

The proper decree, where the mortgagor is himself a party to

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the suit, and is primarily liable for the payment of the deficiency, and a third person is made a party defendant who is only secondarily liable, is to decree the payment of the deficiency by the principal debtor in the first instance; and to decree payment of the amount of such deficiency against his co-defendant who stands in the situation of his surety merely, only in case it cannot be collected of the principal debtor, after the return of an execution against such principal debtor unsatisfied. The decree in such cases should also direct that, in case the amount of the deficiency is paid by the defendant who is only secondarily liable for such deficiency, he shall have the benefit of the decree; for the purpose of obtaining satisfaction for the same amount, with the interest thereon, from the defendant who is primarily liable.

In the present case the bill does not state when the assignment of the bond and mortgage was made and the \$2800 received, by the assignees, as the consideration thereof. The only thing admitted by the assignors, by suffering the bill to be taken as confessed, is that the assignment was made, and the consideration thereof paid, before the commencement of this suit. The time of the filing of the complainant's bill must therefore be ascertained from the bill on file, and inserted in the decree, as the time of such assignment. And nothing must be deducted from the liability of the assignors, under their guaranty, on account of the interest paid in November, 1844; as that does not appear to have been paid subsequent to the assignment, or to have been received by the complainant. After the usual decree for the foreclosure and sale of the mortgaged premises, and the payment of the debt and costs out of the proceeds of such sale, and a decree over against the mortgagor personally for the deficiency, if any, the decree must further direct, that if the complainant is not able to collect the amount of such deficiency out of the estate of the mortgagor, upon the issuing of an execution, against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this state, the defendants, John G. Fellers and George Fellers, upon the return of such execution unsatisfied, pay so much of such deficiency as

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the proceeds of the master's sale, and the amount if any which shall have been collected of the mortgagor personally, subsequent to the assignment to the complainant, exclusive of the costs and expenses of the foreclosure and sale, shall be less than the \$2800, and the interest thereon from the time of the filing of the bill in this cause to the time of such sale; with the interest on that part of the deficiency, from the time of the master's sale until it shall be so paid by them. The decree must further direct, that if they pay the amount thus decreed against them personally, or if the same is collected out of their property, they shall have the benefit of the decree against the mortgagor. For the purpose of enabling them to obtain remuneration from him to the same extent, with interest; either by a new execution against his property, or by filing a creditor's bill, as they may think proper. But after they have obtained a remuneration for what they shall have been compelled to pay under this decree, the residue of the decree against the mortgagor, for the deficiency, will belong to the complainant, under the decision of the court for the correction of errors in the case of *Rapelye v. Anderson*, (4 *Hill's Rep.* 472;) as a part of his contingent profits, upon the purchase of the bond and mortgage, beyond the amount advanced by him to the assignors, and the legal interest thereon.

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CHRISTIE vs. HERRICK & CLARK.

Where it appeared, in a suit brought by the assignee of a mortgage to foreclose the same, that it was the intention of the assignor to give to such assignee the right to receive the moneys due upon the mortgage, and to foreclose in his own name, and to apply the proceeds of the mortgage to the payment of certain debts for which the complainant was holden as the surety for the assignor; *Held* that a decree in such suit would be a perfect protection to the defendants therein, and to those who might become purchasers under the decree, against any claim of the assignor or of the creditors whose debts were thus provided for; and that it was unnecessary to make the assignor, or the creditors, parties.



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Where a mortgage is assigned as a mere security for the payment of a debt, or where but a part of the mortgage debt is assigned to the complainant, the assignor is a necessary party to a bill filed to foreclose such mortgage.

But where there is an absolute and unconditional assignment of a bond and mortgage, and the assignee subsequently files a bill to foreclose the mortgage, it is not necessary to make the assignor a party.

The same principle is applicable, *it seems*, to the case of an absolute assignment of a bond and mortgage to a third person in trust, to collect the amount due thereon, and apply the same to the payment of the debts of the assignor.

It is a general rule that all persons materially interested in the subject matter of the suit ought to be made parties; and that the cestui que trust, as well as the trustees, should be brought before the court. But it seems the case of assignees or other trustees of a fund, for the benefit of creditors, who are suing for the protection of the fund or to collect moneys due to the fund from third persons, is an exception to the general rule that the cestui que trust must be made a party to a suit brought by the trustee.

THIS was a demurrer by Herrick, one of the defendants, to the complainant's bill. The object of the bill was to foreclose and obtain satisfaction of a bond and mortgage, given by Herrick to T. D. Christie, on the 14th of November, 1840, conditioned for the payment of \$2759, with interest from the date of such bond and mortgage; of which sum \$759, with the interest thereon, was to be paid in one year, and the residue in four equal, annual payments from that time. The bill set out an absolute assignment of the bond and mortgage to the complainant, in May, 1841. But the assignment stated that the money, when collected, was to be applied in liquidation of the debts for which the complainant stood security for the assignor. The bill further stated that in May, 1843, the complainant brought a suit upon the bond, in the supreme court, against Herrick, in the name of the obligee therein, and recovered a judgment for the penalty of the bond, and for \$53,45 damages and costs; and that an execution was issued upon such judgment, in June, 1843, upon which execution there was endorsed a direction to the sheriff to levy \$1259, and the interest thereon from the date of the bond and mortgage; that being the amount then due and payable according to the condition of such bond and mortgage, and the costs, and interest thereon from the date of the judgment. This execution was afterwards returned unsatisfied, except as to three

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dollars. The complainant further alleged, that he subsequently filed a creditor's bill against Herrick, for the purpose of collecting the amount due upon the judgment, in which suit he had realized, or would realize, exclusive of costs, the sum of \$1197,08, and interest thereon from the 13th of May, 1843, which was the whole amount received or secured to him on account of that judgment. And he then averred that the sum of \$1232,85 was due to him for principal, on the 14th of November, 1840, with the interest on that sum from the 13th of May, 1840, and which still remained due and unpaid; and that a further instalment of \$500, with interest thereon from the 14th of November, 1840, would become due on the 14th of November, 1845. The defendant demurred to the bill specially, upon the ground that it appeared that T. D. Christie had an interest in the mortgage, and that he was not made a party to the suit.

*S. J. Wilkin*, for the complainant. I. It does not appear from the bill that T. D. Christie has any interest in the mortgage. The bill sets forth that T. D. Christie, on the 6th day of May, 1841, by his instrument in writing endorsed on the mortgage, for value received did assign the same, together with the bond accompanying it, to the complainant; the money, when collected, to be applied in liquidation, on the debts; the complainant stood security for the said T. D. Christie to Howell, Reeves, and others not mentioned. The instrument thus set forth is an absolute assignment. It transfers to the complainant the mortgage, bond, and all in any wise belonging thereunto. His title is not subject to any condition by which it may be re-vested in the assignors. It is not necessary that any thing should happen or be done, to make the complainant's right to the mortgage perfect and complete. (*Whitney v. McKinney*, 7 *John. Ch.* 144. *Miller v. Bear*, 3 *Paige*, 468.)

II. Although the objects to which the mortgage money is to be applied, when collected, are specified in the assignment, yet that provision does not make the right of the complainant to the mortgage any the less perfect and absolute. His right to foreclose the mortgage and get in the money due thereon, is by the as-

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signment, certain and exclusive. It is only when the money is collected, that T. D. Christie can have any claim to interfere with his proceedings, if at all.

III. Unless it appears from the bill, that T. D. Christie has some interest in the subject matter of this suit, that is, in the money due on the mortgage, at least, he is not a necessary party. This must appear at least probable. The phraseology employed in the assignment, would seem to imply, that there would be no surplus. The money, when collected, is to be applied in liquidation on the debts referred to. Courts of equity will not require a person having only a possible interest, or one not necessarily affected by the decree, to be made a party. (*Lube, Eq. Pl. 23, note.*)

IV. It is the better rule concerning parties to suits in equity, that every person who has an interest in the object of a suit, is a necessary party, and no others. (*Story's Eq. Pl. 96, note. Id. § 72, 141.*) Here T. D. Christie has no interest in the proceedings for foreclosure. He has transferred to the complainant the mortgage, and by such transfer there is vested in him fully and exclusively the right to foreclosure.

V. If it is considered that Thomas D. Christie stands in the position of one having a contingent interest in the surplus proceeds of the mortgage, after the payment of the security notes, he is not, in such case, a necessary party to this suit. His rights, in this view of the case, amount to no more than a mere equity, to call upon the assignee of the mortgage, to account for the proceeds after they are collected. He has intrusted to the complainant the sole power of collection, and his equities are subject to such power. (*Rogers v. Tradesman's Ins. Co. 6 Paige, 587.*)

VI. The rule requiring all persons interested to be made parties, does not extend to all persons consequentially interested. (*Story's Eq. Pl. § 140.*) The interest of T. D. Christie, if he has any in this suit, is merely consequential.

VII. In all the cases, in the courts of equity of this state, where it has been held, that the assignor of a mortgage was a necessary party to a bill of foreclosure, the assignments were in

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the nature of a mortgage, and not absolute, as in this case. (*See 7 John. Ch. Rep. 144.*)

VIII. There can be no pretence that perfect justice cannot be done, without making T. D. Christie a party to the bill in this suit. His rights cannot be affected by the proceedings of foreclosure, since these rights amount to a mere equity, to have an account with the assignee concerning the surplus proceeds, after payment of the debts mentioned in the assignment, if it shall turn out that there is such a surplus. Nor do his rights warrant him to interfere with the proceedings for foreclosure. They can only be enforced when the mortgage moneys are got in, by the assignee. And in what respect can the mortgagor, who has filed his demurrer, be benefitted, by making the mortgagee a party? If he has equities which he desires to enforce against the mortgage, such equities cannot be affected by this addition to the parties. The complainant stands in the place of the mortgagee, and holds the mortgage subject to all equities which could be enforced if it had never been assigned. It has been established as a rule in courts of equity, that if the person whose non-joinder is complained of, would be a mere formal party, it will not be required to make him one. It is enough if entire justice can be done.

*John Ganson*, for defendant Herrick. I. The assignment of the mortgage sought to be foreclosed is not absolute; it does not divest the mortgagee, Thomas D. Christie, entirely of his interest in the moneys secured thereby. For by paying the debts referred to in the assignment, he would have the right to redeem the mortgage of the complainant. He also has an interest in the account to be taken as to the sums paid, and as to the balance remaining due upon the mortgage. He is, therefore, a necessary party. (*Hobart v. Abbott*, 2 P. Wms. Rep. 643. *Johnson v. Hart*, 3 John. Cas. 322. *Whitney v. McKinney*, 7 id. 144.)

II. The mortgage having been assigned for the benefit of Samuel S. Seward, and others in the assignment named, they are necessary parties, as cestuis que trust.

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III. The bill does not show that, at the time it was filed, there was \$100 payable, and it does not appear with sufficient certainty therefrom, to what decree the complainant is entitled; inasmuch as it therein appears that \$1197,08 of the moneys secured by the said mortgage have been otherwise secured to the said complainant, or have been partly realized. But it does not appear whether that sum, or any part of it, is so secured as to leave the premises still liable to the payment thereof, or to discharge them therefrom.

IV. The decree which is prayed for against persons not parties to this suit should not be granted. The bill prays for a decree barring and foreclosing all equity of redemption of those who have any liens upon the premises, and who are not made parties to the suit. That portion of the statute which rendered it unnecessary to make persons parties who have liens by judgment or decree subsequent to the mortgage, has been repealed. (*See Sess. Laws of 1840, p. 289, § 9.*) This section was amended in 1844. (*See Sess. Laws of 1844, chap. 346, § 9.*)

THE CHANCELLOR. The bill in this case does not show that the original mortgagee has such an interest in the bond and mortgage as to make him a necessary party to the bill of foreclosure. Where the mortgage is assigned as a mere security for the payment of a debt, as in the cases of *Hobart v. Abbot*, (2 P. Wms. 643,) and *Johnson v. Hart*, (3 John. Cas. 322,) cited by the defendant's counsel, or where but a part of the mortgage debt is assigned to the complainant, the assignor is a necessary party to a bill filed to foreclose the mortgage; so that a perfect decree may be made which will protect the mortgagor, and the purchaser of the mortgaged premises under the decree to be made in the suit, from any future claims which the assignor may make notwithstanding his assignment. But where there is an absolute and unconditional assignment of a bond and mortgage, to the complainant who subsequently files a bill to foreclose the same, it is not necessary to make the assignor a party to such suit. For, although the fact of the

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assignment may be contested in a subsequent suit by the assignor, the mortgagor must set up that defence, if it actually exists, in the suit brought against him by the assignee to foreclose the mortgage. Or, at least, the defendant must show by his answer, and by the proofs in the cause if the allegation in the answer is put in issue, that the assignor claims an interest in the mortgage adverse to the assignment, before he can compel the complainant to make the assignor a party to the suit. And the same principle appears to be applicable to the case of an absolute assignment of a bond and mortgage to a third person, in trust, to collect the amount due thereon and apply the same to the payment of the debts of the assignor. Such assignments are frequently made; and it would be unjust and oppressive to the mortgagor to charge him with the useless expense of making all the cestuis que trust parties, to a bill of foreclosure filed by the trustee. Yet there would be more propriety in requiring the complainant to make Seward, and the other creditors of the assignor, to whom the moneys collected on this bond and mortgage are, by the terms of the assignment, to be paid parties to this suit, than the assignor himself; who has only a contingent interest in the surplus, if any there should be, after the payment of those creditors. Again; from the terms of the assignment, as stated in the bill, I think it may fairly be presumed that the debts for which the complainant was liable as surety, and to the payment of which he is directed to apply the mortgage moneys when collected, are more than sufficient to exhaust all of the proceeds of the bond and mortgage when collected.

The general rule, unquestionably is, that all persons materially interested in the subject matter of the suit ought to be made parties; and that the cestui que trust, as well as the trustees, should be brought before the court, so as to make the performance of the decree safe to those who are compelled to obey it, and to prevent the necessity of the defendants litigating the same question again with other parties. But the case of assignees, or other trustees of a fund for the benefit of creditors, who are suing for the protection of the fund, or to collect moneys due to the fund from

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third persons, appears to be an exception to the general rule that the cestui que trust must be made a party to a suit brought by a trustee. Lord Redesdale says, trustees of real estate, for the payment of debts or legacies; may sustain a suit either as plaintiffs or defendants, without bringing the creditors or legatees before the court, which in many cases would be almost impossible; and the rights of the creditors or legatees will be bound by the decision of the court against the trustees. (*Mitf. Pl. 4 Lond. ed. 174.*) And in *Franco v. Franco*, (3 *Ves. Rep. 76.*) where one trustee filed a bill against another, to compel him to replace stock, belonging to the trust fund, which he had improperly sold, Lord Rosslyn overruled a demurrer, which had been filed by the defendant, upon the ground that the cestuis que trust, to whom the proceeds of the trust fund were ultimately to be paid, were not made parties. So in the case of *Bifield v. Taylor*, (1 *Moll. Rep. 193, Beat. Ch. Rep. 91, S. C.*) where a bill was filed by the trustee, to raise the arrears of an annuity which had been granted to him in trust for himself and four other persons, Lord Chancellor Hart overruled the objection of the defendant that the cestuis que trust were not made parties to the suit; it appearing to have been the intention, of the parties creating the trust, to give to the trustee the power to collect and receive the annuity, for himself and the other parties interested therein with him, without the necessity of their interference. The case under consideration comes directly within the principle decided in *Bifield v. Taylor*. For it was evidently the intention of the assignor of this bond and mortgage, to give to the assignee the right to receive the moneys due thereon, or to foreclose the same in his own name; and to apply the proceeds to the payment of the creditors to whom the complainant was holden as the surety for the assignor. I think, therefore, a decree in this case will be a perfect protection to the defendants, and to those who may become purchasers of the mortgaged premises under the decree, against any claim of the assignor or of those creditors, arising out of the assignment in trust; and that it was unnecessary to make the assignor or the creditors parties.

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Another objection was raised upon the argument of the demurrer, which was not stated in the demurrer itself; that it does not sufficiently appear upon the bill that there was \$100 due and payable, or how much was in fact due upon the bond and mortgage, exclusive of what had been collected by the execution at law, or upon the creditor's bill founded on the judgment and execution upon the bond. The complainant has undoubtedly made a mistake in the insertion of dates in his bill; probably by leaving out the word *four*, after the words "one thousand eight hundred and forty," in stating the amount of the principal, \$1232,85, due upon the mortgage, exclusive of the last instalment; and by omitting the word *three*, in stating the year when the interest on that amount commenced. By the statement in the bill, the \$1232,85 is alleged to have been due on the day of the date of the mortgage, one year before any part of the mortgage moneys became payable by the terms of the bond and mortgage, and that the interest on that amount is due from the 14th day of May, 1840, which is six months before the bond and mortgage were executed. But as it is alleged that the whole of this amount remains due and unpaid, and the bill shows that the whole amount collected upon the judgment, and under the creditor's bill, was two or three hundred dollars less than the sum which had become due and was unpaid at the time of the recovery of the judgment, it does not appear from the bill that the amount in controversy does not exceed \$100. A general demurrer to the bill cannot therefore be sustained. And the complainant can correct these errors, by stating the amount which was actually due at the time of the commencement of the suit, in an amendment of his bill, before the defendant puts in his answer.

The demurrer must be overruled, with costs. And the defendant must pay those costs, and put in his answer, within twenty days; or in case the complainant amends his bill, he must answer the same within forty days after the service of the amended bill and the order to answer, or the bill will be taken as confessed.



**HANNA and others vs. CURTIS and others.**

When a notice of motion must specify the grounds of the motion.

Admissions of an assignor, made subsequently to the assignment, are not binding upon the assignees.

THIS was a motion to dissolve an injunction, upon bill and answer.

*Geo. Underwood*, for the complainants, objected to the notice of motion, because it did not state the grounds upon which the motion would be made. He insisted that if the application was based upon the fact that the whole equity of the bill was denied by the answer, that point should be stated in the notice.

*H. R. Mygatt*, for the defendants.

THE CHANCELLOR decided that the rule of practice requiring a notice of motion to specify the particular points intended to be insisted on, was only applicable to cases where the opposite party has a right to explain, or answer the matters of the objections, by affidavit; and to cases where, by the practice of the court, the opposite party has a right to amend, or to perfect his defective proceedings, on proper terms.

He also decided that admissions of an assignor of property, assigned to trustees for the benefit of his creditors, made subsequent to the execution of the assignment, were not legal evidence against the assignees.

**MOEHRING vs. MITCHELL, public adm'r, &c.**

[Affirmed, 3 Den. 610; How. Cas. 502. Criticised, 12 N. Y. 415, 423. Relied on, 85 N. Y. 602-3.]

**Where** a married woman procured a policy of insurance, upon the life of her husband, in her own name, and for her sole use, as authorized by the act of April, 1840, the insurance money being made payable to her children in case she should die before her husband, and subsequently both husband and wife, and their only child, perished at sea; by the same disaster, and probably at the same moment. *Held*, that the act of April, 1840, did not extend to the case; and that this contract of insurance stood upon the same footing as any other contract made by a feme covert, in her own name, in the lifetime of her husband, and without the intervention of a trustee.

**Where** the mother and daughter perished at sea, and by the same disaster, and there was no evidence of survivorship; *Held*, that there was no legal presumption that the daughter survived the mother.

*It seems* that where the husband and wife perish together, at sea, and where there is no evidence to authorize a different conclusion, it will be presumed that the husband survived his wife.

**At common law** the husband may sue upon bonds, notes, and other contracts for the payment of money, given to the wife during coverture, either in his own name, or in the name of himself and wife jointly; at his election.

**Where** he elects to treat them as his own, by bringing a suit in his own name only, the judgment will belong to his personal representatives, although his wife survives him. But if he sues in their joint names, the judgment will belong to her, by survivorship, if he dies first.

**And** where the consideration of the bond, or other security, has proceeded from the wife, or her estate, or where it was the gift of a third person, if the husband does not dispose of such security, or collect the money due thereon, or proceed to judgment thereon in his own name during his lifetime, it seems the debt will belong to her, by survivorship, if she outlives him.

**A feme covert** cannot, under the provisions of the revised statutes, make a will of her general personal estate, during coverture; founded upon the mere assent of the husband to the making of such will.

**And it seems** that she cannot dispose of her separate estate by will, unless such will is made in pursuance of a power, either beneficial or in trust, to dispose of her separate estate by will, or by a testamentary instrument in the nature of a will.

**But** a feme covert having personal estate conveyed to her separate use, with an express power to dispose of it by will at her death, may make a will, or an instrument in the nature of a will; for the purpose of appointing, or disposing of such property, in pursuance of such power.

**THIS** was an appeal from a decision of the circuit judge of the first circuit, affirming a sentence and decree of the surrogate of New-York, refusing to admit to probate, as a will of personal

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estate, an instrument in writing propounded by the proctor of the appellant, as the will of Isabella Leo Wolf, deceased.

The following opinion was delivered by the circuit judge :

KENT, C. J. I agree with the surrogate in his conclusion, as to the invalidity of the will of Mrs. Leo Wolf. The right of making a will of real property a married woman never had, by the law of England or America, at least since the conquest. As to personal property, before our revised statutes, the capacity of a married woman was less restricted. She could not devise lands, because, by the feudal law, none could devise; and the statute of wills, (32 and 34, *Henry 8*,) did not relieve her from this restriction. But she was prevented from exercising the power of testamentary disposition of personal effects, which power, by imperceptible degrees, freeing itself from ecclesiastical usurpations, became common to all persons except married women, by the rights acquired by her husband in her personal property; and with which rights, a power in the wife of bequeathing that personal property would have been inconsistent. (2 *Black.* 498.) The license of the husband gave her the power of testamentary disposition, because it removed the reason for restricting the power.

But the revised statutes, (2 *R. S.* 60,) it seems to me most clearly, put an end, by positive and unequivocal prohibition, to the remnant of testamentary power remaining in married women. "Every person of the age of eighteen years, or upwards and every female, not being a married woman, of the age of sixteen years, or upwards, of sound mind and memory, and no others, may give and bequeath his, or her, personal estate, by will in writing." There is no reservation of pre-existing rights, as in a recent English statute on this subject. (1 *Vict. c.* 26.) What was a common law right has become statutory; and a positive prohibition is enacted against the exercise of the right by any other than those mentioned in the statute. A married woman may not, then, give and bequeath her personal estate by will in writing. The disposition of personal estate, by will, appears to me to be forbidden to married women, by language

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even stronger than that which prevents her devising real estate. The consent of the husband could not authorize a devise of lands; and I cannot see how it can, under our laws, authorize a testament of chattels.

This doctrine will not exclude a disposition of personal property, testamentary in its nature, or akin to a testament, if made by a married woman under a power. For, as was observed in an early case, *Southby v. Stonehouse*, (2 Ves. sen. 610,) such disposition is not a proper will; but merely a direction of the use or trust, arising under the instrument creating the power, and depending for its efficacy wholly upon the validity of that instrument. Neither do I pretend to say it would limit, or affect, the power of a court of equity to carry into effect a wife's disposition of her separate estate. All I mean to say is that, in the present case, I cannot see how the surrogate, in the exercise of his duties in recording and granting probate of wills, could, under our existing laws, permit the paper propounded, to be proved as the last will and testament of Isabella Leo Wolf. The decree of the surrogate is therefore affirmed.

*Geo. F. Allen*, for the appellant. I. The policy of insurance was the separate property of Isabella Leo Wolf. Such is the tenor and effect of the policy. The consideration is sixty-five dollars and forty-one cents, to them in hand paid by Isabella Leo Wolf. It assures the life of Joseph for the sole use of the said Isabella Leo Wolf. The company contract with her, her executors, administrators and assigns, in case of loss, to pay the sum insured to her, her executors, administrators and assigns, for her sole use. (See *Adamson v. Armitage*, 19 Ves. 415; *Ex parte Ray*, 1 Mad. 199.) The provisions in the act, and in the policy, relative to the children, only apply where the wife has not disposed of her interest; at all events, they have no application in the present case, because (1.) The contingency has not happened. Mrs. Wolf and her husband having sailed in the same ship, and never having been heard of, they will be held to have died at the same instant. (*Taylor v. Diplock*, 2 Phil. 261. *Wright v. Saunders*, Id. 266, note (c)

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*Satterthwaite v. Powell*, 1 *Curt. Ecc. Rep.* 705.) and (2.) their only child died with them. Isabella Leo Wolf was fully empowered to become a party to such a contract, and to acquire such rights, by the law of 1840. (*See Laws of 1840, p. 59.*)

II. The policy being thus the separate property of Isabella Leo Wolf, she is regarded, in equity, as to that property, as a feme sole; and as an incident to that property, she had the power of disposing of it, either by will or otherwise. (*Peacock v. Monk*, 2 *Ves. jun.* 190. *Rich v. Cockell*, 9 *Id.* 369. *Fettiplace v. Gorges*, 1 *Id.* 47. *Whistler v. Neuman*, 4 *Id.* 135. *Clancy, Husb. and Wife*, 308. *Methodist Ep. Ch. v. Jaques*, 17 *John. R.* 578. *Powell v. Murray*, 2 *Edw. Rep.* 643. *N. Am. Coal Co. v. Dyett*, 7 *Paige*, 9; 20 *Wend.* 570, *S. C. Gardner v. Gardner*, 7 *Paige*, 112.)

III. So far as its form goes, the instrument endorsed on the policy is a will, and is entitled to probate. (*Glynn v. Ostrander*, 2 *Hagg.* 432. *Masterman v. Maberly*, *Id.* 247. *In the goods of Joseph Knight*, *Id.* 554. *Lovell on Wills*, 317.)

IV. Being made by a married woman, it may not be, strictly, and at law, a will; but being of a testamentary nature, its testamentary character must be established by being proved as wills are proved; before courts, either of law or equity, will take cognizance of it. (2 *Roper, Husb. & Wife*, 188, and note (m). *Stevens v. Bagwell*, 15 *Vesey*, 152. *Picquet v. Swan*, 4 *Mass.* 60.)

V. The provisions of the revised statutes have not changed, in any respect, the rights of married women to separate estates, or their powers over such estates. 1. The statute relative to wills of personal property, (2 *R. S.* 60, § 21,) was not intended to change the position of married women, in equity, as to their separate property, but to regulate the manner of making wills. 2. It makes no change in the law, but is merely declaratory of what was before the law. (2 *Black. Com.* 498. *Toller on Executors*, 9, 10. *Lovell on Wills*, 266.) 3. The legislature only intended to declare what was the law. (*Reviser's notes*, 3 *R. S.* 2d ed. 629. *Heyer v. Bergen*, 1 *Hoffm. Rep.* 2.) The statutory provision in reference to wills of personal prop

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erty, is identical, in effect, with what has been a statutory provision in reference to wills of real property for over three hundred years; under which courts of equity have always sustained the testamentary disposition of their separate real estate made by married women. (*See cases cited under the second point. Bradish v. Gibbs, 3 John. Ch. Rep. 523.*) The two provisions are in *pari materia*, and should both receive the same construction.

*H. Wilson*, for the respondent.

THE CHANCELLOR. The facts in this case, so far as the same can be ascertained from the proceedings returned by the surrogate, are substantially these. In May, 1840, Isabella Leo Wolf, the wife of Joseph Leo Wolf, procured a policy of insurance, from the New-York Life Insurance and Trust Company, upon the life of her husband, for \$5000, for the term of five years. The policy was in her own name, and for her sole use; as authorized by the first section of the act of April, 1840, in respect to insurances for lives for the benefit of married women. (*Laws of 1840, p. 59.*) And the amount was made payable to the assured, or her executors, administrators or assigns, for her sole use, within sixty days after due notice and proof of the death of her husband; and in case of her death before his decease, the same was made payable to her children, for their use, or to their guardian if they were under age; as authorized by the second section of that act. In March, 1841, the assured and her husband, and, as the counsel for the appellant states, their only child, sailed for Europe in the steam ship *President*, and have never since been heard of; and there is no doubt that such ship was lost, and that all on board perished. A few days before they sailed for Europe, Mrs. Leo Wolf executed the paper propounded as her will, in the presence of two subscribing witnesses, on the back of the policy of insurance, in the following words: "In the event of the within policy, No. 1321, of the New-York Life Insurance and Trust Company, becoming payable, by said company, in consequence of the death of my hus-

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band, Joseph Leo Wolf, and in the event of my being, at the time when the within policy becomes payable, not among the living, it is my wish and will, and I hereby order and direct that the amount insured in said policy, on the life of my husband, shall be paid over to Doctor Gottlieb Moehring, of the city of Philadelphia, in trust; to be held by him for my daughter Mary Jane Leo Wolf, until her becoming of age; and in the event of her death, before coming of age, without issue, I hereby direct that the whole amount thus held in trust by the said Gottlieb Moehring shall be divided in equal parts and shall be paid over to the children of the brothers and sisters of my husband, Joseph Leo Wolf, living at the time when such division shall take effect. Given under my hand and seal in the city of New-York, this 6th day of March, 1841. Isabella Leo Wolf." (L. S.) And her husband, at the same time, and in the presence of two subscribing witnesses, wrote the following consent under the same; "I consent to the above, and ratify the same. New-York, 6th March, 1841. Joseph Leo Wolf."

In April, 1842, G. F. Allen, as proctor for the appellant, who was the trustee, or executor, named in the instrument propounded as a will, presented a petition to the surrogate of New-York, stating that the decedent left assets or personal estate in the city and county of New-York; and praying that the instrument propounded might be admitted to probate, and that letters testamentary thereon might be granted. The next of kin of the decedent were duly cited to attend before the surrogate, and the public administrator, having taken out administration on the estate of Joseph Leo Wolf, was also cited; and they resisted the probate of the instrument propounded, upon the ground that a married woman could not, under the provisions of the revised statutes, make a will of personal estate, even with the consent of her husband. The surrogate sustained the objection, and rejected the instrument propounded as a will, upon that ground alone. And the circuit judge, upon appeal to him, arrived at the same conclusion; as appears by his written opinion.

The insurance money in this case, by the terms of the policy,

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was made payable to the children of the assured, in case she died before her husband. If her daughter had survived her, therefore, it would have been necessary, perhaps, to inquire whether there is any legal presumption that the husband survived his wife; when they have both perished by the same disaster, and when there is no extrinsic evidence to guide the judgment of the court upon this matter of fact. In the cases of *Taylor v. Diplock*, (2 *Phill. Rep.* 267,) *Colvin v. The King's Proctor*, (1 *Hagg. Eccl. Rep.* 92,) and in *Selwyn's case*, (3 *Idem*, 748,) it appears to have been supposed, in the absence of any evidence to justify a different conclusion, that the court would be bound to presume a survivorship of the husband, where the husband and wife perish together at sea; upon the ground, I presume, that the greater strength of the male would probably enable him to sustain life the longest, in such a calamity. But as there is no presumption of the survivorship of the daughter, in this case, after the death of her mother, and the probability is that they both perished at the same moment, it becomes immaterial to inquire whether it must be presumed that the husband survived his wife. It is sufficient for this case, that there is no legal presumption that she survived him. For if she did not survive him, I am of opinion that the act of April, 1840, does not extend to the case; and that, in the event which has occurred, this contract of insurance stands upon the same footing as any other contract made by a feme covert, in her own name, in the lifetime of her husband, and without the intervention of a trustee. By referring to the first section of that act it will be seen that the insurance money is only payable to her, to and for her own use, free from the claims of the representatives of the husband, and of his creditors, in case she survives her husband; but not where they both die at the same instant, or where he survives her. The second section of the statute provides for the case of survivorship of the husband, where the wife has left children; by authorizing the insurance money to be made payable to such children, or to their legal guardians, for their use. But no provision is made, by the statute, for this case; where there are no children, and where the husband survived



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the wife ; or where they both perished at the same instant, so that neither survived the other.

In regard to bonds, notes, and other contracts, for the payment of money, given to the wife during coverture, the common law rule appears to be, that the husband may sue upon them in his own name, or in the name of himself and wife jointly, at his election. Where he elects to treat them as his own, by bringing a suit and proceeding to judgment in his own name, the judgment will belong to his personal representatives, although his wife survives him. But if he sues in their joint names, the judgment will belong to her by survivorship. And where the consideration of the bond, or other security, given to the wife in her own name, during coverture, has proceeded from her, or her estate, or where it was the gift of a third person, it seems that if the husband does not dispose of such security, or collect the money thereon, or proceed to judgment in his own name, during his lifetime, it will belong to her by survivorship if she outlives him. (*See Nash v. Nash*, 2 *Mad. Rep.* 133 ; *Hilliare and wife v. Hambridge*, *Alley's Rep.* 36 ; and *Searing v. Searing*, 9 *Paige's Rep.* 283.) In cases of this kind, as well as in cases of choses in action given to the wife before coverture, or other property of the wife not reduced to possession by the husband, the wife was permitted, previous to the revised statutes, to dispose of the same by will, with the written authority and consent of her husband, in case he survived her. The principle upon which such wills were originally sustained in equity, and afterwards at law, probably was that as the husband, if he outlived the wife, would be entitled to the property by survivorship, and had also the right to reduce it to possession immediately, during coverture, he might waive such right. He could, therefore, allow her to appoint it to whom she pleased, by an instrument in the nature of a will ; although such will was, in fact, nothing but an appointment with his assent. The provisions of the revised statutes, however, have somewhat changed the husband's rights to the property of his wife, by survivorship ; by refusing him the right to administer thereon without giving security for the payment of her debts, to the amount of the

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assets which may come to his hands. (2 R. S. 75, § 29.) And as he is entitled to all his wife's personal estate by survivorship, and even during her life subject to her equity to a support out of the same, he ought not to be permitted to deprive his own creditors of the benefit thereof, in case of her death, by permitting her to dispose of it by will, during coverture. The provision of the revised statutes which declares that males of the age of eighteen years and upwards, and unmarried females of the age of sixteen and upwards, *and no others*, may dispose of his or her personal estate by will, (2 R. S. 60, § 21,) is, as I think, sufficient to deprive a feme covert of the right to make a will of personal estate, of the character above described; founded upon the mere assent of the husband to the making of the same. And I am also inclined to think, it likewise deprives her of the right to dispose even of her separate estate by will; where it is not so disposed of in pursuance of a power, either beneficial or in trust, to dispose of such separate estate by will, or by a testamentary instrument in the nature of a will.

The revised statutes, however, have expressly provided for the execution of beneficial powers, as well as powers in trust, by femes covert, in relation to their real estate and chattels real. (See 1 R. S. 732, § 78, 80, and 87; *Idem*, 735, § 105, 106, 110, and 115; *Idem*, 737, § 130; and *Idem*, 750, § 10.) I cannot, therefore, believe that it was intended, by the legislature, to deprive a feme covert, who has personal estate conveyed to her separate use, with an express power to dispose of it by will at her death, of the right to make a will, or an instrument in the nature of a will; for the purpose of appointing or disposing of her separate estate, in pursuance of such power. That question, however, is not necessary to be settled at this time; as there was no power reserved in the policy, in this case, authorizing the wife to dispose of the insurance money, by will or otherwise, in the event which has occurred. Nor had the interest of the husband, or of the wife, in this policy, been conveyed to a trustee, subject to such a power of appointment by the wife. For these reasons, I think the insurance money belongs to the personal representatives of the husband, to be disposed of as a part of his

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personal estate; and that the instrument propounded as the will of Isabella Leo Wolf, ought not to be admitted to probate.

The order of the circuit judge affirming the sentence and decree of the surrogate must, therefore, be affirmed. As this, however, was a new and somewhat difficult question, arising for the first time under the provisions of the revised statutes, and of the act of April, 1840, I shall not charge the appellant with the costs of the respondent on this appeal; but shall direct such costs to be paid out of the insurance money which is in controversy in this suit.

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 BOYD vs. VANDERKEMP and others.

Upon a bill praying for the specific performance of a contract for the sale of land, or for a compensation in damages, filed by the vendee, against the vendor, and a subsequent purchaser who had notice of the complainant's rights, where the answer of the subsequent purchaser admits that he purchased with notice of the complainant's claim to the premises, and where the bill has been taken as confessed by the other defendants, the proper decree, if the court considers the other material allegations in the bill to have been proved, is to direct a specific performance of the contract by the subsequent purchaser, in whom the legal title to the land is vested; so as to give to the complainant the land itself, with the improvements, if any, which he has made thereon, upon his paying the sum originally agreed to be paid by him, with interest. And it is erroneous, in such a case, to decree a compensation in damages, to the complainant, for the non-performance of the contract.

Upon a bill of that nature, the complainant is not entitled to any decree against a defendant, in whose name, as the agent of the vendor, the bill alleges the contract for the sale of the premises to the complainant to have been executed, by a sub-agent; where such defendant has no interest in the controversy, and is not charged with having done any act, as agent, which was fraudulent or inequitable, nor with having had notice of the contract made by such sub-agent, in his name, until after the sale of the premises to a second purchaser.

It is erroneous to make a mere agent a party to a suit for the specific performance of a contract. And if he is made a party, the complainant will not be entitled even to a decree for costs against him; although he suffers the bill to be taken as confessed for want of an answer.

A general agent, for the sale of lands, is not responsible for the non-performance of a contract, made by an authorized sub-agent without his knowledge.

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But the principal is in law chargeable with notice of a contract, only made by a sub-agent, whom the general agent has appointed under an authority given to him, for that purpose, by such principal.

A vice chancellor has no power to grant a re-hearing, unless it is applied for within six months after the entry of the decree; and before the same has been enrolled.

A bill of review must be brought within the time allowed by law for appealing from the decree.

After a bill had been regularly taken as confessed, for more than nine years, and after a regular decree had been made, against all the defendants, for more than five years, *Held*, that it was too late for a part of such defendants to apply to be let in to answer the bill, and set up a meritorious defence.

Where an appeal has been dismissed by consent of the appellant, an order of the court reinstating such appeal, will not be made for the exclusive benefit of parties who did not join in the appeal.

An appellant whose appeal has been dismissed by the consent of his counsel, has no right to have it reinstated, after the costs of such dismissal have been paid; especially after his discharge under the bankrupt act has left him without interest in the subject matter of such appeal.

It is irregular to make an execution returnable on Sunday. But in general the court will permit process thus defective to be amended, in order to promote the purposes of justice.

An execution cannot issue against a party who has been discharged under the bankrupt act, and whose discharge is a bar to the collection of the damages directed to be paid by a decree which was made before the proceedings in bankruptcy were instituted; although the amount of such damages had not been liquidated, by the master, at the time of the discharge of the bankrupt.

Where a decree is made, directing the defendants to pay the damages which the complainant has sustained by reason of the non-performance of an agreement by them, and directing a reference to a master to ascertain and report the amount of such damages, such damages constitute a present debt, payable when the amount thereof shall be liquidated by the master. And, under the bankrupt law of 1841, such debt is provable, against the estate of one of the defendants who has been declared a bankrupt.

Where an execution was set aside for irregularity, the court directed that the defendants should not be permitted to bring an action against the complainant, or his solicitor, for any thing done under it.

Mode of computing damages, in a suit for the specific performance of a contract for the sale of real estate, or for compensation in damages, under a decree directing a master to ascertain and report the damages which the vendee sustained by the refusal of the vendor to complete the sale.

Where a defendant has been discharged under the bankrupt act, subsequent to the decree against him, for a debt which is provable under the act, it is irregular for the complainant to take out an execution, against the defendant, upon such decree; without a previous application to the court for leave to issue such execution.

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THIS was an application, by the defendants in this cause, to the chancellor for relief, under the following circumstances; the office of vice chancellor of the sixth circuit being vacant at the time of such application. In January, 1833, the complainant filed his bill in this cause before the chancellor, against Vanderkemp, Evans and Schermerhorn. That bill stated, in substance, that the defendant Vanderkemp was the owner of 150 acres of the east part of lot number two of Morris' Reserve, then in the possession of T. Younglove, and called the Younglove farm; that in January, 1829, the complainant purchased the premises, from W. S. Wood, the sub-agent under the defendant Evans, who was the duly authorized general agent of the defendant Vanderkemp, at the price of \$2 per acre; five per cent to be paid down, and the residue in eight equal annual instalments; the first instalment to be paid in three years with interest from the last mentioned period; and that upon payment of the purchase money, Vanderkemp was to convey to the complainant, the premises with warranty; that at the time of such purchase the complainant paid to Wood the five per cent and executed a contract to pay the balance in the usual form of contracts used by Evans as such agent; but as the number of the lot was not then recollected, the description of the lot was left blank, to be filled up by Wood; who agreed that, as soon as he returned to Batavia, he would procure the contract to be made out and executed by Evans, as the agent of Vanderkemp and sent to the complainant, or left at the land office, at Batavia, for him; that Wood returned to Batavia immediately after making of the contract, and the complainant took the *control* of the premises, his father-in-law, who was previously in possession, continuing in possession under him; and that within one year thereafter, the complainant removed on to the premises, and had continued in possession thereof up to the time of filing his bill in this cause, and making improvements from the time he went into possession; that in January, 1830, not having received the contract, he went to the land office at Batavia, and finding Evans absent, he learned from a clerk in the office that the five per cent had been paid in by Wood, but that no

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contract had been made out for the premises, and he then, at the suggestion of the clerk, executed a contract on his part, and left it to be executed by Evans on his return; that he again called at the land office, in October, 1831, and again found that Evans was absent, and was then told by another clerk, that the five per cent had not been paid into the office, and that Wood had no authority to sell lands, or to make contracts for such sale; that he shortly afterwards wrote to Evans on the subject, and received in reply a letter from J. Lowber, purporting to have been written for Evans, acknowledging that \$15 was credited to the complainant upon the books of the office, and that the same was subject to his order, but that a large tract of land, embracing the premises in question, had been sold to the defendant Schermerhorn. The bill further stated, that the complainant had heard of the purchase by Schermerhorn, before his visit to Batavia, in October, 1831; and averred that it had been so purchased, and that a conveyance thereof had been given to Schermerhorn, by the vendor, but that Schermerhorn had notice of the complainant's rights in the premises previous to such purchase; that as soon as the complainant heard of such purchase, he gave notice of his rights to Schermerhorn, and requested a compliance with the terms of the agreement so made by Wood, and that Schermerhorn refused to comply with the same. The bill further charged, among other things, that Wood was duly authorized to make the agreement with the complainant on behalf of the defendant Vanderkemp, and that such agreement was binding upon Vanderkemp and Evans, and was in equity binding upon Schermerhorn as such purchaser. The complainant therefore prayed that the defendants, or such of them as to the court should seem meet, might be decreed to give a contract or covenant for a deed to him for the premises, upon the terms and conditions agreed upon between him and Wood; or that they might be compelled to indemnify or compensate him for the damages he had sustained, or might sustain by reason of their non-compliance with such agreement; and that he might have such other and further relief, as the nature of his case required.

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The subpoena was personally served on Evans and Schermerhorn, and the defendant Vanderkemp authorized his attorney to admit due service thereon for him, he being a resident of Philadelphia. Schermerhorn appeared by F. M. Haight as his solicitor, and the defendants Evans and Vanderkemp by D. H. Chandler. A copy of the bill and notice of the order to answer, was served upon the solicitor for the two last named defendants, on the 15th of June, 1836. But as an arrangement had before that time been made between these defendants and Schermerhorn, that he should defend the suit for them as well as for himself, and they had instructed their solicitor accordingly, such solicitor took no notice of the bill and order served upon him; and an order was thereupon duly entered, on the 18th of August, 1836, taking the bill as confessed against Vanderkemp and Evans, for want of an answer. The bill was not sworn to, and an answer on oath was waived. After some negotiations between the complainant and Schermerhorn for a compromise, the latter offering to give the complainant a contract for the land upon the terms of Wood's alleged agreement, Schermerhorn put in his answer, denying the authority of Wood to make the alleged contract, but admitting that he was informed of the complainant's claim previous to the conveyance to him of the premises; though he was also informed, by Evans, the agent of Vanderkemp, that the complainant had no legal or equitable right to the land. The answer also stated the proposition to give the complainant a contract, as a compromise, upon the terms and conditions mentioned in Wood's agreement, as stated in the bill, although the complainant had not paid, or offered to pay, the first annual instalment, which had become due previous to the filing of the bill; and that such offer was declined unless he would pay the complainant's costs, and give him a new contract, dated four years subsequent to the alleged agreement, and upon the same terms specified in that agreement. The defendant Schermerhorn also, in his answer, renewed the offer to comply with the terms of the alleged agreement made by Wood, upon the complainant's paying what was then due, according to the conditions of that agreement, and paying the

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costs to which Schermerhorn had been put, subsequent to his previous offer. A replication to this answer was filed, and testimony was taken in the cause as between the complainant and Schermerhorn, and the defendant Evans was examined as a witness for the latter under an order of the court. He testified, in substance, that he sent Wood with contracts executed by himself as agent for Vanderkemp, leaving the descriptions of the lands, the names of the purchasers, and the amount of the purchase money in blank, for the purpose of giving such contracts to certain settlers upon the land under previous contracts made by them with one Taylor, and for the same premises specified in their previous contracts respectively, at the price of two dollars per acre; with authority to fill up the blanks in such contracts and deliver them to such of those settlers as should accept and execute the same; and that the said Wood had no authority whatever to make, or agree to make, any contract for the sale of the lands in any other way or manner; that no contract was entered into by Wood and the complainant, to the knowledge of the witness, though it appeared from the books of the office that \$15 was paid by the complainant to Wood, and was credited to him; that five contracts were entered into by Wood, and delivered in pursuance of his instructions; and that on the 26th day of January, 1829, Wood wrote to the witness, that, contrary to his expectations, there were but few prepared to take contracts; and, notwithstanding the timely notice given them, but five appeared and executed contracts; that no other persons manifested a desire to avail themselves of the opportunity, except one gentleman who was confined to his bed by indisposition, and sent his son-in-law, H. W. Boyd, to take a contract for him; but having learned that neither could accurately decide what part of the lot they wanted, he, Wood, deferred the business until they should furnish a survey of the land; which met their approbation, and that they promised to get the survey as soon as possible. The witness further stated that Wood had left the state, and then resided at Green Bay; and that the clerk, who subsequently filled up a contract, in the absence of the witness, to be executed by him on his return, had



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no authority to make contracts; and the witness never heard of the contract which was thus filled up, until after the sale and conveyance of the land to the defendant Schermerhorn. The complainant proved the making of the agreement by Wood, substantially as stated in the bill; but he introduced no testimony showing that Wood had any authority to contract as agent or as sub-agent, for Vanderkemp, other than in the manner stated by Evans.

The cause was afterwards referred to the late vice chancellor of the sixth circuit for hearing and decision; and was argued before him, by counsel on the part of the complainant, and of the defendant Schermerhorn only; no one appearing on the part of the defendants Evans and Vanderkemp. And on the 25th of April, 1839, the vice chancellor made a final decree in the cause; by which he ordered and decreed that the complainant recover from all of the defendants jointly, the amount of the damages sustained by the complainant by reason that they had refused to complete, on their part, the sale made to him by Wood, as the agent of Evans, of the premises in question, as stated in the bill; that it be referred to a master to ascertain and report the amount of such damages; that upon the coming in, and confirmation of the master's report, the defendants should pay the amount of damage so ascertained, with costs; and that the complainant have execution thereof.

On the sixth of May, 1839, the complainant's solicitor took out a summons, before Master Campbell, of Bath, to proceed before him, upon the reference, on the 30th of that month; which summons was served on D. H. Chandler, as the solicitor of the defendants Evans and Vanderkemp, on the 10th of May. He admitted due service on the back of such summons, on that day, and added thereto a note, directed to the complainant's solicitor, and subscribed by himself as solicitor for those two defendants, as follows: "You need not serve on me any further papers in this cause. I waive the service of them." Previous to the return day of that summons, the defendant Schermerhorn appealed to the chancellor, from this decree of the vice chancellor. Before any argument of that appeal, Schermerhorn applied for a dis-

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charge under the bankrupt law of the United States; and was finally discharged from all his debts, in July, 1843. The cause was noticed for hearing on the appeal for the January term, 1845, and the defendant Schermerhorn thereupon gave notice of the presenting of a petition, at the same time, for an order allowing him to plead his discharge, under the bankrupt act, in bar of any personal claim which the complainant might make against him in this suit; or for such other relief as he might be entitled to. Upon the hearing of that application, the chancellor suggested, that as the discharge in bankruptcy was subsequent to the final decree, it was unnecessary to plead the discharge upon the appeal, as it would not affect the question of costs upon the appeal; and that if the appeal was dismissed, the discharge would be a bar to further proceedings to collect the debt decreed to be paid by the vice chancellor. The counsel for Schermerhorn assented to that course, and an order was directed to be entered dismissing the appeal with costs; including the costs of opposing the petition. This order was drawn up, and settled by the counsel for the complainant and of Schermerhorn, but was not in fact entered; but the costs were subsequently taxed, and were paid to the complainant's solicitor.

The complainant afterwards proceeded in the reference before the master *ex parte*; no person attending on behalf of either of the defendants. And on the 25th of April, 1845, he obtained a report for \$3,250, for the damages which he had sustained by reason of the refusal of the defendants to complete the sale mentioned in the decree, *including reasonable rent for the use and occupation of the premises to the date of such report*. The report was filed, and an order nisi entered to confirm the same, on the 8th of May; and the costs were subsequently taxed in the suit before the vice chancellor at \$214,35; and the decree was duly enrolled and docketed. On the 21st of May, 1845, the complainant caused an execution to be issued against all the defendants, to the sheriff of the county of Genesee, for the amount of damages reported by the master, and the taxed costs; which execution was made returnable on the 15th of June thereafter, which was Sunday.

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The defendants, upon a petition and affidavits setting forth these facts, and that the defendants Evans and Vanderkemp were ignorant of the decree and subsequent proceedings until after the issuing of the execution; that they had relied upon the agreement of Schermerhorn to defend the suit for them, as well as for himself; that they were advised that the decree was erroneous; and that the appeal had been dismissed without the knowledge or consent of the defendant Schermerhorn; and upon affidavits showing that the damages as reported by the master, were extravagant and enormously excessive, moved that the reference to the master might be opened; that his report and the order confirming the same might be set aside, and a new reference had in the premises; or that the appeal of Schermerhorn might be reinstated; or that the defendants Evans and Vanderkemp might be authorized and permitted to put in an answer to the complainant's bill, and to take proofs thereon, that the execution and all proceedings thereon might be set aside; and that the petitioners might have such further or such other relief as the nature and circumstances of the case might require.

*D. H. Chandler*, for defendants. I. The bill does not make such a case as to entitle the complainant to a decree, although it was taken as confessed. The bill alleges an agreement by parol for the purchase; which was to be reduced to writing. The bill does not allege who were to have been the parties to that agreement in writing, or who should have executed it for the vendee. The bill does allege that the oral agreement was reduced to writing and completed in all particulars, except as to the number of the lot; that complainant authorized Wood to complete it by making the necessary addition; and that Wood assumed to do it. The oral agreement was merged in the written agreement, and superseded it; and hence the written one was all that could be enforced. The bill does not allege any performance of the agreement by the complainant, beyond the payment of \$15, at the time it is alleged to have been made; although before the bill was filed other payments of interest had

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fallen due and were unpaid. Neither does the bill contain any offer to perform. A performance, or at least an offer to perform, was necessary. (*See 7 Monr. Rep. 142; Id. 656; 3 Litt. Rep. 292; Litt. Sel. Cas. 129, 453; 1 McCord's Ch. Rep. 39; 1 A. K. Marsh. 43, 451; 5 John. Ch. Rep. 193.*)

Evans is made a party, and a decree prayed against him, yet the bill admits him to have been but a bare agent of Vanderkemp. It does not charge him with having exceeded his authority, or with having acted fraudulently. Without such allegations he cannot be made liable. (*15 John. Rep. 1, 44. 9 Wend. 68. 4 Id. 285. Hite v. Goodman, 1 Dev. & Bat. 364.*) No fact is alleged as against Vanderkemp, by which he should be charged with liability, whether Wood had authority from Evans or not; because it is not alleged that he had given authority to Evans to substitute another to do an act which he was authorized to perform. No statement is made in the bill of the nature and character of the authority delegated to Evans by Vanderkemp, or of the nature or character of the authority conferred by Evans on Wood. Nor, under the general and vague statements in the bill, is there any proof made or offered, of the power or authority of Evans or Wood to act in the premises.

The first prayer of the bill, for the execution of the oral agreement by executing a covenant by the defendants to perform the oral agreement, is one unknown to the principles or practice of this court. All that the court could do would be to direct the defendants to execute a deed, under an agreement sufficiently established; giving the complainant his rights at once.

The act of sale and conveyance by Vanderkemp to Schermerhorn was, per se, a rescision of the pretended agreement with the complainant, and having performed his part of the agreement, as the obligations thereof bound him, the complainant's right to legal or equitable redress was as perfect then as it ever could have been. And he was then, if ever, entitled to a deed, and should have sought that redress. The whole basis of the bill is for a specific performance of the alleged oral agreement. For what other cause, and in what sense aside from that, was Schermerhorn made a party? But having shown all the parties capable

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of submitting to such decree as he asked for in that particular, the complainant has taken one of a very different nature. The oil, on its face was framed for a purpose which this court could have entertained, but with the covert intention of turning it to another account. If the prayer of the bill could not have justified a decree for a specific performance, the prayer for compensation must fall, and no decree could properly be made under it. The court will not retain a bill for assessing damages, unless the party complainant shows himself entitled to a specific performance. The only claim to jurisdiction arises from that right.

In this case, by the proofs made, (though the bill evades the point, but not artfully,) time was of the essence of the agreement, yet no performance is alleged, in or out of time; nor even an offer to perform. This was necessary. (*See Benedict v. Lynch*, 1 *John. Ch. Rep.* 370.) By the showing of the bill there was a rescision of the agreement long before the bill was filed; and that was known to complainant. Equity will not, in such a case, retain the bill to assess damages; but will leave the party to his remedy at law. (*Kempshall v. Stern*, 5 *John. Ch. Rep.* 193.) The bill is framed upon the idea that the oral contract was part performed by the payment of the \$15, and by the possession and occupancy by complainant. So far as possession makes a part performance, the bill does not allege any stipulation for taking it, otherwise than that it was inferred from the agreement. And the statement of the agreement does not allege that any such stipulation was made.

The general prayer for relief is bad. It is "*and* for such other and further relief," instead of being in the disjunctive.

For the defects above stated, the bill was demurrable, and would probably have been dismissed had a demurrer been interposed.

II. By the proofs taken by the complainant he has deprived himself of any right to a decree; and he is bound by the proofs made by himself, although the bill was taken as confessed as against Vanderkemp and Evans. By the proofs the agreement is shown to be different from that stated in the bill. Its provisions were mutual and dependant. The interest upon the purchase money

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was payable annually ; and the conveyance was made to depend upon the performance by the complainant. Again ; he proves by McGee that a written contract was filled up, which had been executed in blank by Evans, corresponding with the Pixley contract, and was then executed by the complainant, and the payment made by the complainant was endorsed by Wood upon it. This proves that no oral agreement was made, or could be made, to rest in parol, and that the complainant and Wood merged it in the written agreement which was executed and treated as *the* agreement. But this proof shows more. It proves Wood's authority to have been special and limited, and that he had no power to make an oral agreement which should bind his principal. For this cause the bill should have been dismissed. No notice of the hearing before the vice chancellor was given to the solicitor for Vanderkemp and Evans. They were entitled to notice. (*Hart v. Small*, 4 *Paige*, 551.) The decree of the vice chancellor should have been for a specific performance of the oral agreement, if for any thing ; provided the parties were in a condition to comply with it. All the defendants were in a condition to execute and deliver a covenant for a deed corresponding with the alleged agreement with Wood. Schermerhorn is not shown to have parted with the title, and he could have conveyed, if under the bill such a decree could have been pronounced. And the defendants Evans and Vanderkemp might have been decreed to join with him in such conveyance. The decree for damages was therefore extravagantly erroneous. The taking of the bill as confessed as against Evans and Vanderkemp did not subject them to a decree, unless upon an inspection of the bill and proofs a case was made entitling the complainant to a decree. The court was bound to have exercised its judicial vigilance, and a sound judicial judgment, before making a decree against them ; and finding that they were not obnoxious to a decree, should have dismissed the bill as against them with costs. (*Rose v. Woodworth*, 4 *John. Ch. Rep.* 547. *Geary v. Sheridan*, 8 *Ves.* 192. *Barret v. Birmingham*, *Irish Eq. Rep.* 417. *Landon v. Ready*, 1 *Sim. & Stu.* 44.) A cause may be reheard, where a decree has been made upon the bill taken as confessed

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(*Tooke v. Clark*, 1 *Dick. Rep.* 350. 1 *Barb. Ch. Pr.* 353, 370.) Taking the bill pro confesso does not amount to an admission of any fact not stated in the bill, nor of legal deductions. (*Cornel's heirs v. Day*, 2 *Litt. Rep.* 397.) The appeal taken by Schermerhorn not having been regularly dismissed, and he never having authorized that measure, it ought to be adjudged as still depending, when a great equity is to be subserved by it. If retained, it will carry with it the decree against Evans and Vanderkemp. It is a joint decree against all, and must be executed as against all, or not at all. Although the bill was taken as confessed as against Evans and Vanderkemp, yet there was not enough of legal elements stated or to be confessed to entitle the complainant to a decree of any kind. This court has the power to open the decree and to relieve the aggrieved parties when injustice has been done. It will exercise this power after a decree, when the aggrieved party, either through mistake or accident, or by the negligence of his solicitor, has not been heard. (*Millsbaugh v. McBride*, 7 *Paige*, 509.) Here is surprise, mistake and misapprehension.

The master's report is erroneous. No summons was served or received. The report does not state how much was allowed for damages, for the non-performance of the agreement, or how much for a reasonable rent for the use and occupation of the premises to the date of the report. This should have been done. It is obvious enough that he allowed \$1500 for damages, being the whole value of the premises, and 14 years rent at \$125 a year, \$1750; making together \$3250. The true principle of allowance should have been as follows. The complainant should have been allowed for the improvements of a permanent nature made on the premises, from the time he took actual possession, under the supposition that he was to have had the land under his alleged agreement with Wood. Possibly he was entitled to interest on that sum up to the date of the report. But there should have been deducted from the aggregate of these sums, with interest, the use and occupation of the premises from the time he occupied them until he quit possession. He was entitled to no pay for improvements made on the premises after the re-

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scision of the agreement by the conveyance to Schermerhorn, because any such, if made, was in bad faith—this was in the fall of 1831, as stated in the bill. The complainant was not entitled to any allowance for improvements made upon the premises by Younglove. He has not alleged in his bill that he was in any way entitled to the value of those improvements. They cost him nothing, and therefore on that account he had no claim to compensation as against the defendants. The execution issued in pursuance of the decree is void. It is returnable on Sunday. By the common law Sunday is *dies non juridicus*. (6 Mod. 252. 12 John. 178.) The chancellor has determined it to be irregular at least, if not void, both by his rules and in his reported cases. (See Rule 19; Gould v. Spencer, 5 Paige, 543.)

If Evans had the power to substitute Wood, Wood's acts bound Vanderkemp; and Evans was under no responsibility whatever; and upon the hypothesis of the bill, he was wholly exempt, and owed no duty to the complainant.

This court does not enforce a contract specifically unless its terms, as set out in the bill, are clear, definite, and positive. (Kendall v. Almy, 2 Sumner, 278.) And to entitle himself to a specific performance of a contract, a party must show that he has been always ready to perform on his part. (*Idem.*) The bill should have alleged specially the damages the complainant has sustained, and in what they specially consist. (Doar v. Gibbes et al. 1 Bailey's Eq. Rep. 371.) This is not alleged in the present bill.

*Julius Rhoades*, for the complainant.

**THE CHANCELLOR.** The decree in this case was unquestionably erroneous, not only as to the defendant Schermerhorn, upon the pleadings and proofs, but also as to the other defendants; even upon the facts stated in the bill, which was taken as confessed as to them. The answer of Schermerhorn admitted that he purchased after he had been informed, through his agent, of the complainant's claim. If the vice chancellor, therefore, considered the allegations proved, he should, instead of de-



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erceiving a compensation in damages to the complainant, have decreed a specific performance of the contract by Schermerhorn, in whom the title to the land was then vested ; so as to give the complainant the land itself, with the improvements, if any, which he had made thereon, upon his paying the contract price, with the interest thereon, according to the terms of the alleged contract made with Wood. And in that case also, it might have been proper to decree costs against the defendants Schermerhorn and Vanderkemp. The complainant, however, was not entitled to any decree whatever against Evans, who was improperly made a defendant ; even upon the complainant's own showing. The bill does not allege that Evans had any interest in the controversy ; or that he had done any act whatever, as agent, which was fraudulent or inequitable ; or that he even knew of the agreement alleged to have been made by Wood, as the sub-agent, until after the premises in question, with other lands belonging to Vanderkemp, his principal, had been conveyed to the defendant Schermerhorn. Upon the bill taken as confessed, it must be taken to be true, as stated therein, that Wood was a sub-agent, duly employed under Evans as the general agent of Vanderkemp. If so, Evans is not responsible for the non-performance of a contract made by the sub-agent, and of which he was ignorant ; although Vanderkemp, the principal, is in law chargeable with notice of the contract, duly made by his sub-agent whom his general agent had authority to appoint and had so appointed. The bill, therefore, did not entitle the complainant to any relief against Evans, nor even to a decree for costs against him ; although Evans had suffered such bill to be taken as confessed for want of an answer.

As an answer on oath was waived, the defendants Vanderkemp and Evans probably supposed the solicitor for Schermerhorn could put in an answer for them, and make a defence for all, as he had agreed to do. Their solicitor, therefore, took no notice of the papers, which appear to have been regularly served upon him, from time to time, down to the 10th of May, 1839, when he waived the service of any other papers in the cause upon him. By relying upon Schermerhorn, to put in an answer for them as well as for himself, and neglecting to have

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his solicitor substituted in place of Chandler, they have remained in ignorance of the proceedings in the cause, and have lost the opportunity of denying the authority of Wood to make the alleged agreement as sub-agent. They have also lost the right of appealing from the erroneous decree of the vice chancellor. The decree of the 25th of April, 1839, being a final decree in the cause, the time for appealing therefrom is limited, by the statute, to six months from the time of the entry of such decree. (1 R. S. 178, § 65.) The rules of the court prohibit a vice chancellor from granting a rehearing, unless it is applied for within six months after the entry of the decree, and before the same has been enrolled. And a bill of review must be brought within the time allowed by law for appealing from the decree. (*Thomas v. Harvie*, 10 *Wheat. Rep.* 146. *Welf. Eq. Pl.* 231. *Rule* 173.) It is also too late for these two defendants to be let in to answer a bill which had been regularly taken as confessed nine years since; and after a regular decree has been made against them on such bill, and upon pleadings and proofs as to their co-defendant. Nor would reinstating the appeal of Schermerhorn probably aid *them*, as they had not joined in that appeal; and the decree, as to them, is therefore final and conclusive. The defendant Schermerhorn has himself no equitable claim to have the appeal reinstated, after his counsel have consented to have it dismissed, and the costs of such dismissal have been paid; especially as his discharge under the bankrupt act is a bar to any claims against him upon this personal decree. And his assignee in bankruptcy may be a necessary party to the proceedings, if the decree is to be modified so as to make it a decree for a specific performance of the contract to convey the land itself.

The proceedings before the master were regular, although the order dismissing the appeal had not been actually entered. For the appeal bond was only for costs, and did not therefore stay the proceedings upon a final decree. The execution, however, was irregular; not only because it was made returnable on the sabbath, but also because it was issued against Schermerhorn, who had been discharged under the bankrupt act; as well as against the other defendants who were still liable upon the final decree of

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April, 1839. In *Gould v. Spencer*, (5 *Paige's Rep.* 541;) this court decided that it was irregular to make any process returnable on the sabbath. That, however, is a mere technical objection; and, in an ordinary case, the court would permit an amendment of the process, to promote the purposes of justice.

In regard to Schermerhorn, however, the execution is erroneous in substance. For his discharge under the bankrupt act was a bar to the recovery of the damages recoverable under the decree, although the amount of such damages was unliquidated at the time of his discharge. By the decree of the vice chancellor the amount of damages, which the complainant was decreed to be entitled to in consequence of the non-performance of the alleged agreement made by Wood with him, became a present debt; payable when the amount thereof should be liquidated by the master. It was therefore a debt which was provable against Schermerhorn's estate, under the provisions of the bankrupt law of 1841. Under the English bankrupt laws, previous to May, 1825, debts depending upon a contingency, except such as arose upon bottomry or respondentia bonds or upon policies of insurance, which were provided for as early as the 19th of George the 2d, could not be proved under a commission in bankruptcy taken out before the happening of the contingency upon which the debt was payable. (*Cooke's Bank. Law*, 141.) There was also a class of debts, for uncertain and unliquidated damages, arising upon contracts, which could not be proved under a commission taken out before the amounts of such debts were ascertained. (1 *Deac. Law of Bank.* 280.) The 56th section of the act of May, 1825, to amend the laws relative to bankrupts, covered all cases of mere contingent debts. But the case of *uncertain* debts arising from breaches of contracts, where the amount of damages was unascertained, and could not be computed so as to be sworn to as debts, were left still unprovided for. (See *Henley's Bank. Law*, 132.) The 5th section of the United States bankruptcy law of 1841, however, provides in express terms, that all creditors whose debts are not due and payable until a future day; all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties,

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endorsers, bail, or other persons having *uncertain* or contingent demands against the bankrupt, shall be permitted to come in and prove such debts or claims under the act. And the preceding section makes the certificate a full and complete discharge, of all debts which are thus provable; with the exceptions in the cases of fraud, misconduct, or misapplication of trust funds in that section mentioned. The execution must therefore be set aside as irregular, against all of the defendants, and as wholly unauthorized as to one of them. But neither of such defendants is to be permitted to bring an action against the complainant, or his solicitor, for any thing done under such execution.

The petitioners are also entitled to relief in relation to the amount of damages reported due by the master. It is evident, from the affidavits and testimony before me, that the estimate of the value of the property, made by some of the witnesses upon the reference, was exaggerated and extravagant. The report also shows that the master must have adopted an erroneous rule of damages; as he has included therein an allowance, to the complainant, for the rent of the premises, down to the date of his report, in 1845. All that the complainant was entitled to recover, as damages for the non-performance of the alleged agreement, was the value of the premises and improvements thereon at the time of filing his bill, on the 7th of January, 1833, when he alleges he was in possession; after deducting therefrom the purchase money agreed to be paid, but which had not in fact been paid, together with the interest on such purchase money up to that time according to the terms of the agreement. And upon the amount of damages thus ascertained, the master should compute interest from the 7th of January, 1833, up to the date of his report.

The report of the master and all subsequent proceedings thereon must therefore be set aside, and the enrolment of the decree must be discharged. It must be referred back to the master to review his report, and to take such further testimony as either of the parties shall think proper to produce before him. And he must be directed to ascertain the damages upon the

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principles above stated. The complainant is to have the benefit of the testimony which was taken before the master when the case was previously before him; but with liberty to the defendants to compel the attendance of the witnesses who were then examined, and to cross-examine them, if the defendants shall be able to procure such attendance upon subpœna, or otherwise. And the order to be entered hereon must further direct, that upon the coming in and confirmation of the report of the master, the complainant have execution against the defendants Evans and Vanderkemp, for the amount of the damages as stated by the master in such amended report, together with his costs, as directed by the decree of April, 1839; but that no execution shall issue against the defendant Schermerhorn, either for damages or costs. Due notice of all future proceedings in the cause, must be given to the solicitor for the defendants Vanderkemp and Evans; but no summons, or notice, or other proceedings, need hereafter be served on the solicitor of Schermerhorn.

The costs of the complainant are to be re-taxed, after the coming in and confirmation of the master's report. And the complainant is to be permitted to include in his bill all such extra costs as shall have arisen from the setting aside of the former report and subsequent proceedings, and the re-investigation of the case by the master; including the order to confirm the new report, the enrolment and docketing of the decree, and the re-taxation of costs. But no allowance is to be made for the execution which is set aside for irregularity, nor for any proceedings thereon; and neither party is to tax, or have any costs, as against the other, upon this application.

The order to be entered hereon, is to be entered with the clerk of the sixth circuit, as of the 9th of August, 1845; when the petition was presented to the chancellor, during the vacancy in the office of vice chancellor of that circuit.

. JOHNSON and others vs. QUACKENBUSH and others.

Where the complainants entered an order to produce proofs, and served it on the agent of the defendants' solicitor, and the defendant, on the last day allowed by the rule for that purpose, applied for and obtained an order, extending the time to take proofs for sixty days, which order was served on the register as the agent of the complainants' solicitor; and about forty days after the expiration of the sixty days, allowed by this order, the defendant entered an order to close the proofs; *Held* that such order was regular.

Although the 15th rule directs that where the service of a notice or paper is upon an agent, or through the post office, there must be double the time of service which would be requisite were the service upon the solicitor in person, the service of an order which merely enlarges the time to take proofs does not come within the provisions of the rule.

Where the object of the service of a paper or notice is to restrict the rights of the adverse party, in case he does not act upon it within the time required by the practice of the court, the 15th rule gives him double the ordinary time when such service is made upon an agent, or through the post office.

*Aliter*, where the notice or paper served enlarges, instead of restricts, the time within which the party, upon whom it is served, was previously bound to do the act required. Under an order to produce proofs, the right to close the proofs, at the expiration of the time limited by the practice of the court, is reciprocal in the respective parties. And where an order, requiring the defendant to produce proofs, within forty days after service of notice thereof, is served on the defendant's agent, neither party can enter an order to close the proofs until after the expiration of eighty days.

Where an order extends the time for doing an act for a certain number of days, without saying, after service of the order, the time for doing the act is restricted to the number of days mentioned therein; whether the order is served personally, or is served by mail, or upon the agent of the adverse solicitor.

THIS was an application, on the part of the complainants, to open an order entered by the defendants to close the proofs in this cause; and also for an order extending the time to produce witnesses for forty days. The bill was filed by the complainants to foreclose a mortgage upon 100 acres of land in Onondaga county, given by G. Quackenbush to J. L. Voorhees, in October 1823, and assigned by Voorhees to John Quackenbush, the father of the mortgagor, in January, 1844. The defendant Lawrence claimed title to the mortgaged premises under a mortgage given by G. Quackenbush and wife, in 1836, to J. Barbero, one of the defendants, to secure the payment of a loan of \$800, and interest; which mortgage was sold and assigned to

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Lawrence on the 5th of September, 1843, and was foreclosed under the statute, and the premises bid in by the defendant Lawrence, in February, 1844. The complainants were executors and trustees of the mortgage of October, 1823, under the will of John Quackenbush, for the benefit of G. Quackenbush, the mortgagor for life, with remainder to his oldest son; with power to foreclose the same for their benefit. In December, 1843, the bill in this cause was filed, against G. Quackenbush and wife and J. Barbero, and in July, 1844, it was amended by making Lawrence, who was the assignee of the Barbero mortgage, and the owner of the premises, under the statute foreclosure, and also the tenant of Lawrence, parties to the suit. The defendant Lawrence, by his answer, admitted the giving of the mortgage of October, 1823, but he denied any knowledge of its having been acknowledged, proved, or recorded, as stated in the complainant's bill, and any information on the subject, except from statements contained in the bill. He also set up in his answer, that at the time of the execution of the mortgage to Barbero, for money lent, the mortgagor represented that the premises were free from any incumbrance thereon. He also set up as a defence that the first mortgage had been paid to J. Quackenbush, the assignee thereof, in his lifetime; or out of moneys which he had received from the estate of the brother of his deceased wife, and which moneys belonged to the mortgagor. Replications having been filed to the answers of Lawrence and of Barbero, the complainants entered an order to produce proofs, and served it on the agent of the solicitors for those defendants, on the 16th of April, 1845. The defendant Lawrence thereupon applied for and obtained the usual order for leave to examine his co-defendants, G. Quackenbush and wife and J. Barbero, as witnesses as to any matters in which they were not interested. Lists of witnesses were furnished by the parties respectively, and on the 23d of June, 1845, the complainants' solicitor proceeded to take testimony. After producing certain documentary evidence, and obtaining the admission of several facts from the other party to be noted by the examiner, they stated that they had gotten through with their evidence. And they refused to extend the time to

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produce testimony ; although informed by the defendant Lawrence that he had several witnesses to produce, who could not be examined within the time limited by the order. The defendant Lawrence was, therefore, compelled to apply to the court for an extension of the time ; and on the last day allowed by the rules for that purpose, he succeeded in obtaining an order extending the time for sixty days. This order was entered on the 5th of July, 1845, and was immediately served upon the register, as the agent of the solicitors for the complainants. The defendant Lawrence thereupon proceeded to take his testimony. He produced and proved the execution of the bond and mortgage to Barbero, and the consideration thereof ; the assignment of that bond and mortgage to himself ; and the foreclosure of the same under the statute, as mentioned in his answer. He also examined Barbero as a witness, and proved by him an admission of John Quackenbush, in his lifetime, and within two or three years after the giving of the mortgage of October, 1823, and the assignment thereof from Voorhees, that such mortgage had been paid. He also attempted to examine the defendant Garret Quackenbush as a witness, but he kept out of the way, so that he could not be subpoenaed. About forty days after the expiration of the sixty days allowed by the order of the 5th of July, 1845, to produce proofs, Lawrence entered an order to close the proofs in the cause. The principal object of the application on the part of the complainants was to enable them to produce testimony to impeach Barbero as a witness. And the solicitors swore they believed that by the practice of the court, the complainants were entitled to one hundred and twenty days, after the 5th of July, 1845, to produce witnesses ; because the order of that date, extending the time, was served on their agent, and not upon themselves personally.

*N. Hill Jun.*, for the complainants.

*J. Rhoades*, for the defendant Lawrence.



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THE CHANCELLOR. The entry of the order to close the proofs in this case, after the expiration of the sixty days to which the time to take proofs was extended by the order of the 5th of July, 1845, was regular; and was, I believe, in accordance with the general understanding and practice of the profession in such cases. It is true, the 15th rule of this court declares that where the service of a notice or paper is upon an agent, or through the post office, there must be double the time of service which would be requisite if the service was upon the solicitor in person. But the service of an order which merely enlarges the time to produce proofs in a cause, does not come within the provisions of this rule. Where the object of the service of a paper or notice is to restrict the rights of the adverse party, if he does not act upon it within the time required by the practice of the court after such service, the 15th rule gives him double the ordinary time, if the service is made upon his agent, or through the medium of the post office. For the legal presumption, in such a case, is, that the delay in obtaining actual notice of the service of the paper or notice will render more time necessary to do the act required, than if such paper or notice had been served upon the solicitor himself. But no such presumption can arise in a case where the notice or paper served enlarges, instead of restricts, the time within which the party, upon whom it is served, was previously bound to do the act required. Here, the original order to produce proofs required the defendants to produce the same within forty days after service of notice of the order. And as the service of the order restricted their right, which was before unlimited, and as that service was upon the agent, the defendants had double the time, or twice forty days, after the service of that order, to produce testimony; before an order could be entered to close the proofs. The right to enter an order to close the proofs being reciprocal, under the provisions of the 68th rule, neither party could enter the order, upon such a service, until after the expiration of the eighty days. (*James v. Berry*, 1 *Paige's Rep.* 647.) The order of the 5th of July, however, did not require either party to produce witnesses within a specified time after service of that order. But it merely extended the time, which

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was previously restricted to the 5th of July, sixty days from that time; and whether the order was served personally, or upon the agent of the complainant's solicitors, the time of such extension was limited to the sixty days allowed by the order of the court. For, the rights of the parties to enter an order to close the proofs being reciprocal, if the practice contended for by the complainants in this case is sanctioned by the court, a solicitor who obtains an order, from the court, extending the time to produce witnesses for a certain number of days, can always obtain double that time, when he resides in a different city or town from the adverse party, by merely serving his order through the medium of the post office.

The solicitors of the complainants have, in this case, however, undoubtedly mistaken the practice; and I should be disposed to open the order to close the proofs generally, if there was any reason to believe it would be conducive to the ends of justice. The defendant Lawrence does not, in his answer, state that he was aware of the existence of the mortgage of October, 1823, at the time of the assignment from Barbero. But he states that, previous to such assignment, G. Quackenbush told him the premises were free from incumbrances. His rights, however, do not depend upon that question, but upon the question whether Barbero was a bona fide mortgagee, without notice of the existence of a prior mortgage which was a valid and subsisting incumbrance upon the premises. For if that mortgage was not legally proved, or acknowledged, so as to entitle it to be recorded, the bare fact of its being upon the record was not constructive notice to any one. And, if Barbero states truly, that John Quackenbush informed him that the mortgage had been paid, Lawrence, as the assignee of Barbero, is entitled to protection, as a bona fide purchaser under him; even if Lawrence had learned, previous to the assignment, that the complainants claimed there was such a mortgage as they are now attempting to foreclose, and that it was still unpaid.

The documents which the complainants propose to offer in evidence, are not such papers as could be acknowledged, and read in evidence without proof of their execution, at the time

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they purport to have been acknowledged. And the names of the subscribing witnesses to the release of John Quackenbush, are not in the list of witnesses whom the complainants have a right to examine. Indeed, the instruments themselves, if fully proved, would be wholly immaterial. For if Alida Quackenbush survived her brother, so as to give her any interest whatever in his estate under his will, that interest must be considered, in equity, as converted into personalty at the death of the testator. (*Hutchinson v. Mannington*, 1 *Ves. jun.* 366.) And the proceeds would therefore belong to the husband of the legatee, upon her death, as a part of her personal estate; and not to her children as real estate. (*Ashby v. Palmer*, 1 *Meriv.* 296. *Dougherty v. Bull*, 2 *P. Wms.* 230. *Bartholomew v. Meredith*, 1 *Vern.* 176. *Maberly v. Strobe*, 3 *Ves. jun.* 450.) It may, however, be material in this case, to show that Alida Quackenbush survived her brother, and did not die in his lifetime, as supposed by one of the defendant's witnesses. For if she died first, her children, and not her husband, would be entitled to a portion of her lapsed share of the estate of the testator; as property undisposed of by the will. And the share of Garrett Quackenbush in that property, which was received by his father from the executors, would be properly applicable to the payment of the mortgage held by the father. The complainant must therefore be permitted to examine any witnesses named in their original list, to prove the time of her death; unless the defendant's counsel shall, within twenty days, stipulate to admit the fact, upon the hearing of this cause, that she died after the death of her brother, the testator. If that fact is not admitted, the order to close the proofs must be so far opened as to permit either party, within sixty days after the entering of the order upon this decision, to examine witnesses to that point only. But if it is admitted, then the order is not to be opened for any other purpose than to examine witnesses as to the general character of J. Barbero, as to truth and veracity. Upon that point there is a conflict of testimony on this motion, though the weight of evidence is clearly in favor of his veracity. On a question of so much importance in this cause, however, I cannot deny the

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complainants the right to impeach him, if he is, in fact, not to be credited. The order to close the proofs must, therefore, be so far opened as to permit either party, within sixty days after the entry of the order hereon, to examine witnesses as to that point; and then the proofs are to be considered as closed without the entry of any further order. The complainants, however, must, in any event, pay to the solicitors of the defendants Lawrence and Barbero, their costs of opposing this motion, to be taxed; and within twenty days after service of a copy of the taxed bill, and a demand of such costs.

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WILLIAMS, ex'r, &c. vs. HARDEN and others.

An executor is liable for the costs, upon a bill of discovery filed by him in aid of a defence at law, where it appears, by the defendant's answer, that there is no fact within the knowledge of the latter which is material to the complainant's defence. The complainant, in a bill of discovery in aid of a defence in a suit at law, must state a case which will constitute a good defence to such suit.

What evidence may be required, by an executor, of the justice of a claim presented against the decedent's estate.

The defendant, in a suit at law, is not entitled to come into the court of chancery, for the discovery of a mere isolated fact; which fact may, or may not, be material to his defence. But in order to sustain a bill of discovery, the complainant therein must show what his defence to the suit at law is; so that the court can see that the fact of which a discovery is sought, if admitted to be as stated in the bill, may be material in the establishment of such defence.

THIS was an appeal, by the defendant J. Harden, from a decree of the vice chancellor of the fifth circuit, denying the appellants application for costs, upon a bill of discovery. The complainant, and the defendant Priscilla Harden, were the executor and executrix of the will of Thomas Harden, deceased; and the defendant J. Harden, presented a claim against the estate, for the amount of two promissory notes, of \$500 each, purporting to have been given to him by the testator, in June, 1843

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The personal representatives of the decedent having refused to allow these notes as a just claim against the estate, the parties entered into an agreement, in writing, to refer the matter in controversy to three disinterested persons, to be approved of by the surrogate, as authorized by the statute. And the surrogate having approved of such agreement, the complainant caused the same to be filed in the office of one of the clerks of the supreme court, and caused an order to be entered referring the claim, according to such agreement. The complainant, as he alleged in his bill, subsequently demanded, of the defendant J. Harden, a statement of the consideration of the two notes, and the facts and circumstances attending the making and holding of such notes. But the latter declined making any statement concerning the same, in the absence of his counsel. The complainant thereupon filed his bill in this cause, and obtained an injunction to stay the proceedings before the referees until the bill had been fully answered. The complainant charged, that the two notes were not, nor was either of them, good and valid claims against the estate of the decedent, and that the estate ought not to be compelled to pay the same, or any part thereof. But he did not state wherein they were invalid, except that he made a general charge upon his own knowledge, and not upon his mere information and belief, that the signatures to the notes, purporting to be those of the testator, were not genuine and were never made by the testator, or by his direction, or with his knowledge or assent; or if the signatures were genuine, that the notes were forged by being written over his name without his knowledge or assent; or if the notes were not thus forged, the testator never delivered or intended to deliver them to the payee, except upon some condition to be first fulfilled by him; or if they were absolutely delivered they were delivered as gifts and without consideration, when the testator was in perfect health, and not in anticipation of death, as gifts to take effect after his death. And upon these allegations, the complainant founded his claim to a discovery of all the facts and circumstances attending the execution of the notes, and the consideration of such notes. The defendant answered the bill, denying the

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alleged forgery of the notes, and showing that they were voluntarily and unconditionally executed and delivered to him by the testator, who was his father; and stating a good and sufficient consideration for the notes.

*E. J. Richardson*, for the appellant.

*O. S. Williams*, for the respondent.

THE CHANCELLOR. I have not been able to discover any thing in this case to take it out of the principle of the decision of this court in the case of *Boughton and Mills, executors, v. Phelps*, (6 *Paige's Rep.* 334.) It was there held that an executor was liable for the costs upon a bill of discovery, filed by him in aid of a defence at law, where it appeared by the defendant's answer that there was no fact within the knowledge of the latter which was material to the complainant's defence at law. Although many serious charges, contained in this bill, are sworn to as being true of the complainant's own knowledge, the whole frame of the bill shows that he could not have intended to swear that he really had any knowledge that these notes were either forgeries, or that they were given without consideration, or were otherwise invalid. In other words, it was a mere fishing bill, for the purpose of ascertaining, from the answer of the defendant, whether the representatives of the decedent had, or had not, a valid defence against the claim made upon the notes. And if the bill had stated the facts as they really were—that the defendant had presented two notes as valid claims against the estate, which the complainant had some reason to suspect were not actually due, and that the defendant refused to tell him what the consideration of the notes was, or the circumstances under which they were given—no injunction could have been obtained thereon. For the bill, in that case, would have been clearly bad upon demurrer; as the complainant, in a bill of discovery in aid of his defence in a suit at law, must state a case which will constitute a good defence to such suit. (*Welf. Eq. Pl.* 119.)

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The statute specifies what evidence of the justice of a claim, presented against the decedent's estate, by an alleged creditor of such estate, the executors or administrators have a right to require. They may require satisfactory vouchers in support of the claim; that is, in the case of a note, they may require the production of the note itself, or evidence that it has been lost or accidentally destroyed, if that fact is within the knowledge of a third person. And they may also require the affidavit of the creditor that the debt claimed by him is justly due; that no payments have been made thereon, and that there is no offset against the same to the knowledge of the claimant. (2 R. S. 88, § 35.) There is no pretence that such an affidavit was called for by the executor in this case and that the defendant refused to make it; or that any further evidence than the production of the notes themselves was necessary to satisfy the complainant, and the executrix, of the genuineness of the testator's signature to such notes. The defendant, in a suit at law, is not entitled to come into this court for the discovery of a mere isolated fact which may or may not be material to his defence. But, in order to sustain a bill of discovery, the complainant therein must show what his defence to the suit at law really is; so that this court can see that the fact of which a discovery is sought, if admitted to be as stated in the bill, may be material in the establishment of such defence.

In the present case the complainant has entirely failed in obtaining the discovery of any fact which appears material to his defence against the defendant's claim upon the notes of the testator. It is therefore impossible to refuse costs to the defendant, without overturning a well established principle of the court in reference to such bills. The order appealed from must of course be reversed. And the respondent must pay to the appellant his costs in the suit before the vice chancellor, together with the costs upon this appeal, out of the estate of the testator which has come into his hands as executor.

PROCTOR and others, adm'rs, &c. *vs.* WANMAKER, public  
adm'r, &c.

Whenever the property of an intestate, of which the public administrator in the city of New-York is entitled to take charge, exceeds the sum of \$100 in value, the latter must serve a personal notice upon the widow and all the relatives of the decedent, who are entitled to any share of his estate, if they are to be found in the city, of the intention to apply to the surrogate for letters of administration. And in all cases where the notice is not personally served it must be published for four weeks.

And where letters of administration are granted, by the surrogate, to the public administrator, without a personal service of the citation upon the widow and relatives of the decedent, or the publication of a notice in the manner directed by the revised statutes, such grant will be irregular; and the letters of administration may be revoked.

The 31st and 32d sections of the title of the revised statutes relative to public administrators, were not intended to deprive the widow, or next of kin, of the right to have the grant of administration to the public administrator vacated and set aside for irregularity, where it has been improperly obtained without a compliance with the directions of the statute on that subject; although the application for that purpose is not made within the time limited by those sections, in respect to cases where all the proceedings of the public administrator have been correct and regular.

Independently of the statute of 1837, a surrogate has power to call in and revoke letters of administration, which have been irregularly and improperly obtained, upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration.

THIS was an appeal by the administratrix and administrator of Amos Proctor deceased, from an order of the surrogate, of the city and county of New-York, denying the application of the appellants to set aside the letters of administration granted to the public administrator; and also revoking and setting aside the letters of administration which had been granted to the appellants. The decedent was a resident of the city of New-York, and died there in May, 1844, leaving Elizabeth Proctor, one of the appellants, his widow, and several adult children surviving him. His principal property consisted of a claim to a large amount, against the United States; a part of which claim was received, soon after his death, by virtue of letters ad colligendum issued to H. Wilson, the then public administrator. In August, 1844, the



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then public administrator applied to the surrogate and obtained citations, to the widow and children of the decedent, to show cause, on the 24th of September thereafter, why administration upon the estate should not be granted to him. And upon an affidavit of M. B. Butler, that he served the citation personally on the widow and three of the daughters of the decedent, and upon one of the sons by delivering it to the other son for him, and upon the remaining daughter by delivering the same to her husband, the surrogate, on the return day of such citation, granted letters of administration to the then public administrator. The widow, not having in fact been served with the citation, and being ignorant of the granting of administration to the public administrator, applied to the surrogate, ex parte, in May, 1845, and obtained a grant of administration to herself, and to H. Andrew who was associated with her by her consent. And she and the said H. Andrew having given security, as required by law, for the faithful performance of the trust, a supersedeas of the letters testamentary which had previously been issued to the public administrator was subsequently granted. The successor of the public administrator having refused to deliver over the funds of the estate in his hands, the appellants presented to the surrogate a petition, stating the above matters, accompanied by the affidavits of the son-in-law, and two of the daughters of the decedent, showing that the citation of August, 1844, was not served upon the widow, but that it was delivered to one of the daughters; who, supposing it merely to relate to the granting of letters ad colligendum, to which the family had previously assented, laid it by, and never showed it to her mother.

*E. W. Chester*, for appellants. I. It does not appear, nor is it the fact, that the intestate left any goods, chattels or effects within the city and county of New-York, or in any other situation provided for in Part-2, Chap. 6, Art. 1, § 4 of the Revised Statutes, (2d ed. p. 55.) There was, therefore, no right, power or authority to grant administration to the public administrator (See *Hammond v. McLea*, 2 John. Ch. R. 493; *Goodrich v. Pendleton*. 4 Id. 557, 8, 9.) In courts of limited jurisdiction

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it must appear, on the face of their proceedings, that they acted within their jurisdiction.

II. The right of administration was in the widow of the intestate. (2 R. S. 2d ed. p. 17, § 27.)

III. This right was not defeated or impaired by the grant to the public administrator, without notice to the widow as required by the statute. (2 R. S. p. 57, § 16, 17, 18.) Personal notice is required. The letters were voidable, and it was the duty of the surrogate to repeal them. (See *Comstock's Dig. of the Law of Ex'rs and Adm'rs*, p. 263, 264; 1 *Com. Dig. Adm'r*, (B. 6,) (B. 8;) *Salk.* 38; *P. Wms.* 43; 11 *Vin. Abr.* 114; 4 *Burr. Eccl. Law*, 248, 9; 2 *Kent*, 413.)

IV. The grant of administration to the widow was, ipso facto, a repeal of the letters previously granted. (See 11 *Vin. Abr.* 114, and several of the other authorities above cited.)

V. There is nothing in § 32 of the statute, (2 R. S. p. 60,) to prevent the widow's applying after the three months; especially where she has not received even constructive notice of the application, by advertisement, as required in all cases where personal service is not made. That, and the preceding sections, seem rather to refer to cases where the property of the intestate is of less than \$100 value; in which cases, the public administrator becomes vested with the power of an administrator, by his own act, without any formal grant by the surrogate. In such cases, the estate would probably be nearly settled in three or six months. By the act of 1837, (*Gen'l Laws*, p. 180, § 34,) the surrogate is empowered to revoke letters obtained on false pretences. This statute is, in this respect, merely cumulative. For the surrogate clearly had this power before. (11 *Vin. Abr.* 116.) Here was a false pretence in a matter of most material import; and by it, whether intentional or not, the widow's right could not be defeated.

VI. Administration having been granted to the widow, who was rightfully entitled, the surrogate had no power to revoke the same. (See the authorities above cited.) Most especially could he not do this on a citation to the respondent to show cause why he should not deliver up the property of the intestate.

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tate, &c., and without any proceedings instituted against her. She was the rightful legal administratrix. The letters to the public administrator had become null, and the surrogate could not, on his own motion, without a citation and without a hearing, revoke her letters of administration.

VII. Administration granted to a public administrator does not descend, *ex vi officii*, to his successor. The successor must apply and obtain administration de bonis non, as other persons entitled to administration, when the amount of property exceeds \$100, so as to render a formal grant of administration necessary in the first instance. The delivery over to his successor in office, of all papers, money and effects in his hands, as required by the statute, (2 R. S. 63, § 45,) does not make such successor administrator de bonis non. The grant of administration to a public administrator is a grant to him by name, though describing him as public administrator; and it cannot confer authority on his successor.

*M. T. Reynolds*, for the respondent.

THE CHANCELLOR. The grant of administration to the public administrator in September, 1844, was clearly irregular, and should have been set aside by the surrogate. The statute is imperative, that if the property of the intestate exceeds the value of \$100, the public administrator shall serve a personal notice, upon the widow and the relatives who are entitled to any share of his estate, if there be any to be found in the city of New-York, of his intention to apply to the surrogate for letters of administration. And in all cases where the notice shall not have been personally served, it shall be published for four weeks. (2 R. S. 121, § 16, 17.) The affidavit of Butler was therefore insufficient, upon its face, to entitle the public administrator to the grant of administration. For it there appeared that the citation was not served personally upon Oran, one of the sons of the decedent, but that it was only handed to his brother George for him. It is true, Butler now swears that he could not ascertain his residence, after diligent inquiry. But he should have

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stated the fact, that he had made such inquiry, in his former affidavit; and the public administrator should have then produced evidence that he had published the notice, in a newspaper in the city of New-York, for the time prescribed by the statute.

Again: I am satisfied, from the evidence stated in the surrogate's return, that the citation which was returnable in September, 1844, was never in fact served upon the widow, and that she knew nothing of its contents until after the administration had been granted to herself and Andrew. She swears that she had no knowledge that such a citation had been issued, previous to that time. Helen M. Proctor also swears that all the citations annexed to her affidavit, were delivered to her, and that none of them were delivered to her mother; that when the citations were thus served on her by Butler, he remarked that he supposed they ought to be served personally, but that he presumed it would make no difference. And she produces the citations thus served upon her, one of which is directed to her brother Oran, one to herself, one to her mother "Elizabeth Proctor, widow of Amos Proctor, deceased," and one to each of her sisters, Lucy and Elizabeth. She also states that supposing they related to the letters ad colligendum which she and the family had consented should be granted to the public administrator, she did not deliver them to the persons to whom they were addressed, and for whom they were intended, but placed\* them among other papers belonging to the estate. And she is fully supported in this statement by the affidavits of her brother-in-law, and of one of her sisters, who were present when the citations were delivered to her. Butler therefore is undoubtedly under a mistake in supposing that this was a personal service upon the widow, or the other members of the family who were not cognizant of the contents of the papers delivered to Helen M. Proctor.

The provisions of the third subdivision of the 31st section of the title of the revised statutes relative to public administrators, (2 R. S. 124,) appear to have been intended to reach the case of a regular grant of administration, to the public administrator, in relation to property in the city of New-York, where the intestate was an inhabitant of some other county in this state at the

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time of his death ; so that the surrogate of such other county had the exclusive right to grant general administration on his estate, according to the provision of the first subdivision of the 23d section of the title of the revised statutes relative to granting letters testamentary and of administration. (2 R. S. 73.) In that case it will be perceived that, by the provisions of the title relative to public administrators, the surrogate of New-York is authorized to grant letters of administration to the public administrator where the decedent has left goods in the city of New-York, or where goods belonging to his estate have afterwards come there. But, by the provisions of this 31st section, in all such cases of regular administration granted to the public administrator, if letters testamentary had been, or shall thereafter be, granted to an executor of the decedent's will, or if the surrogate of the proper county had already granted letters of administration upon the estate of the decedent, or shall grant such letters within six months thereafter, the powers of the public administrator are to be superseded. And the 32d section was intended to provide for the case where the surrogate of New-York had jurisdiction to grant letters of administration, to the widow or next of kin, but where such widow or next of kin had not appeared and opposed the granting of administration after a notice had been regularly published ; because the widow and relatives did not reside in the city, or because the fact of their residence therein was not known to the public administrator, so as to require him to serve them personally with a notice. Neither of these sections, however, were intended to deprive the widow, or next of kin, of the right to have the grant of administration to the public administrator vacated and set aside, for the irregularity, where it had been improperly obtained, without complying with the directions of the statute on that subject ; although the application for that purpose was not made within the time limited by those sections, in cases where all the proceedings of the public administrator had been correct and regular.

Here the application to the surrogate was made, by the widow, within six weeks after she discovered that administration had

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been granted to the public administrator; and as soon as she found that he intended to contest the right of the appellants to the administration of the estate. The surrogate should therefore have granted that application; and should have revoked and annulled the letters which had been irregularly granted to the public administrator, upon the false or mistaken affidavit that the citation had been personally served upon the widow of the decedent, who was known to be living in the city of New-York. Independently of the statute of 1837, the surrogate was authorized to call in and revoke letters of administration which had been irregularly and improperly obtained, upon a false suggestion of a matter of fact; and without due notice to the party rightfully entitled to administration. (*Cornish v. Cornish*, 1 *Lee's Ecc. Rep.* 14; *Burgis v. Burgis*, *Idem*, 121; *Oglevie v. Hamilton*, *Idem*, 357; *Smith v. Cary*, *Idem*, 418; *Lord Trimblestown v. Lady Trimblestown*, 3 *Hagg. Ecc. Rep.* 243.)

As the grant of administration to the public administrator was irregularly obtained, and must be revoked, it is unnecessary to consider the question whether it is necessary to give him notice, where the widow or next of kin apply for administration within the three months after a regular grant of administration has been made to him. The decretal order of the surrogate must be reversed; and a decree must be entered setting aside and revoking the letters of administration granted to the public administrator, as irregularly and improperly obtained, without due notice to the widow and some of the next of kin. And the letters of administration granted to the appellants must be declared to be valid. The respondent must also be directed to deliver up to the appellants, as the rightful representatives of the estate of the decedent, all the moneys, books, papers and property which have come to his hands.

## GREEN and others vs. HICKS.

Under the usual order of reference to a master to appoint a receiver, in a creditor's suit, the complainant is not authorized to examine the defendant for the mere purpose of ascertaining whether he had not made a fraudulent assignment of his property, previous to the commencement of the suit; unless such property is still in the possession or under the control of the defendant.

Whether the receiver himself has the power, under such an order, to examine the defendant, or any other person, as a witness to establish the fact of such a fraudulent sale or assignment? *Quære.*

Where the property, alleged to be fraudulently assigned, by the defendant, is not in his possession or under his control, so as to make it his duty to deliver it up to the receiver, and to leave the fraudulent assignee or grantee to come in and be heard *pro interesse suo*, the proper course for the complainant is to make the grantee or assignee a party to the suit; so as to have the receivership extended to him.

Form of the order of reference to a master to appoint a receiver, in a creditor's suit, where the defendant appears, but does not give the consent mentioned in the 191st rule.

Under such an order, the complainant is not authorized to examine the defendant, or any other person, as to matters not relating to the appointment of the receiver, or to the ascertainment of the possession, nature, situation, value, character or other particulars of the property which is to be assigned to the receiver, or to be delivered to such receiver by the defendant.

What questions the defendant is bound to answer, on his examination before a master, upon an order of reference to appoint a receiver, in a creditor's suit. And what property he may be directed, by the master, to assign and deliver over to the receiver.

THIS was an appeal from the decision of the vice chancellor of the fourth circuit, denying the application of the complainants for a further examination of the defendant before the master, on a reference upon a judgment creditor's bill. The order of reference, after directing the master to appoint a receiver of the debts, property, equitable interests and things in action of the defendant, at the time of filing the bill, on the 27th of June, 1845, and to take from such receiver the usual security, required the defendant to assign, transfer, and deliver over to such receiver, upon oath, under the direction of the master, all his property real and personal and all contracts for the purchase of land, and all other equitable interests, things in action, and other effects which belonged to, or were held in trust for such defendant, or in which he had any beneficial interest, at the time of

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exhibiting the bill of complaint, except such articles of personal property as were exempted by law from sale on execution, and except also where such trust had been created by, or the fund so held in trust had proceeded from some person or persons other than the defendant; and that the defendant should deliver over in like manner, all books, vouchers, and other evidences relating thereto. The order also contained a provision, that the *receiver* should have full power and authority to inquire after, receive, and take possession of all such property, debts, equitable interests, things in action and other effects; and for that purpose to examine the defendant, and such other persons as he might deem proper, on oath, before the master, from time to time as he might deem necessary. But it contained no provision authorizing the complainants, or any other person except the receiver, to examine witnesses before the master, in relation to the subject matter of the reference; or to examine the defendant himself as to any other matter, except as to the assignment and delivery of the property, effects, and choses in action which belonged to him, or in which he had a beneficial interest at the time of filing the complainant's bill.

The defendant was summoned before the master, upon this reference, on the application of the complainants, to be examined under oath, and to discover, assign, and deliver over to the receiver, the property and effects of the defendant. To the general question, what property he had at the time of the filing of the bill of the complainants, the defendant answered that he did not know that he had any. He subsequently admitted, however, that he had a watch, two swine, and a small case of surgical instruments; which was all the property he had, to his knowledge, except ordinary wearing apparel. In answer to a subsequent question, whether he had any mortgaged property at the time of filing the bill, he admitted that he had such property of the value of more than \$200, which did not include the watch and case of surgical instruments and swine; and that it was in his possession at the time of filing the bill, and most of it was then in his possession. But the master decided that the defendant was not bound to tell when, or for what, the mortgages were



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given. The defendant was afterwards cross-examined by his own counsel, however, although objected to by the counsel for the complainants, and he stated that he should think the mortgaged property would not be worth more than the amount of the incumbrances thereon, to a purchaser. But the amount of the mortgages was not disclosed. The master also decided that the defendant was not bound to answer whether he had, subsequently to the time of filing the bill, disposed of any of the property which was in his possession at that time. The complainants' counsel also proposed to inquire of the defendant what property, real or personal, and debts, he owned or had due to him shortly before the filing of the complainants' bill, and if any, how they had been disposed of? And he also stated to the master that one object of such inquiries was to ascertain what property the defendant had at the time of filing the bill; and that another object was to ascertain the validity of any assignment or transfer, which had been made, in order to give the receiver information, to enable him to recover the property, if such assignments or transfers were invalid. But the master decided that the defendant was not bound to answer any question as to the state of his property previous to the filing of the bill, or how it had been disposed of.

*E. F. Bullard*, for the complainants. I. Under the order of reference the defendant was bound to deliver over to the receiver all property which he had in his actual possession at the time of filing the bill.

II. The receiver had full power and authority to inquire after and receive, and take possession of, all property of the defendant, notwithstanding he had made a fraudulent assignment of it to a third person. And he might bring trover or replevin against the fraudulent assignee for holding such property. But we admit that the defendant could not be compelled to deliver over such property.

III. For the purpose of making such inquiry and discovery, the receiver has the right to examine the defendant and other persons as witnesses. The testimony of the defendant is the

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best evidence to enlighten the receiver; and he is presumed to know more than other witnesses. The master limited the inquiries, to be made of the defendant, to property which he had in his actual possession; and would not allow him to disclose any fraudulent assignments. The vice chancellor thinks the master was right in the restriction, and cites 8 *Paige*, 569, 583. In *Browning v. Bettis*, (8 *Paige*, 568,) the order appointing the receiver restricted the delivery of the property to what the defendant admitted he had. The complainants appealed from that part of the order containing the restriction; which was the only question arising in that case. It was only a question in regard to the form of the order. In *Copous v. Kauffman*, (8 *Paige*, 584,) the decree was against an idiot or lunatic, and did not direct even an assignment; much less an examination on oath. This case does not pretend to touch the point relied upon by the vice chancellor. *Hudson v. Pletts*, decided in August, 1844, which is relied upon by the defendant's counsel, does not reach this case. In that case the examination had been completed; and the court held that a master could not compel a second examination without a special order. The court also held that the master could not compel him to be re-sworn; also that even if the examination had not been closed the defendant could not be inquired of in relation to notes or other choses in action which had been delivered to the receiver and sold by him. In the present case the examination was never completed or allowed to be. *Nesmith v. Halstead*, decided in August, 1845, was an appeal from an order of referees, as to the regularity of the entry, and the form of, the order. But the question as to how far the defendant may be a witness did not arise.

In all the cases cited by defendant, the court only decide that the defendant can only be required to execute the assignment if he swears he has no property in his possession or under his control. In other words, they decide that the defendant shall not deliver what he has not got, and that he shall not do that which it is physically impossible for him to do. But the defendant may be a witness to show the receiver what property he has fraudulently disposed of; and this he can do, both physically and

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morally. If the defendant is honest, and has been so, he cannot object to disclose to the receiver what assignments he has made. *Fitzburgh v. Everingham*, (6 Paige, 29,) is a case in point, and decides that a master may examine witnesses for the purpose of ascertaining whether there is property in the hands of other persons; to enable the receiver to take the necessary steps to recover such property. This case does not say that the defendant is not a proper witness for that purpose. We insist he is a proper witness, and the best and only evidence which can be reached.

IV. The master erred in not allowing the complainants to inquire whether the defendant, since the filing of the bill, had disposed of any property which was in his possession at that time. If the defendant had answered that he had put property out of his hands after the filing of the bill, we should have asked the master to make an order directing him to deliver over and restore such property. Thus if he had buried money or other valuable thing, it would be but disposing of it; and if he did not bring it back and deliver it over under the order of the master, the court would punish him.

V. The master erred in regarding or in allowing objections made by counsel. The privilege of refusing to answer is a personal right of the defendant; and although his counsel can advise him that he is not obliged to answer, yet they cannot object for him.

VI. The master erred in permitting a cross-examination of the defendant.

VII. The examination was not allowed to be gone into sufficiently, in regard to what property the defendant had in his possession or under his control.

*P. Cagger*, for the respondent.

THE CHANCELLOR. The order of reference in this case did not authorize the complainants to examine the defendant for the mere purpose of ascertaining whether he had made a fraudulent assignment of his property previous to the commencement of

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this suit, unless such property was still in the possession or under the control of the defendant, so that he could be lawfully required to deliver it over to the receiver, under the direction contained in the order. It is true the order contains a provision that the *receiver* may examine the defendant, and such other persons as he may deem proper, on oath, before the master; in the execution of his duty, to inquire after, receive and take possession of the property, equitable interests, and things in action which belonged to the defendant, or were held in trust for him, or in which he had any beneficial interest, at the time of filing the bill of the complainants. But the proceeding before the master in this case, was not on the application of the receiver, to enable him to discharge his duty under that part of the order of reference. It was a proceeding by the complainants, under the previous clause of the order which required the defendant to assign and deliver over his property and effects, upon oath, under the direction of the master. Under that clause of the order, the complainants were properly the actors, and had the right to see that the order was complied with on the part of the defendant. And they had also the right to interrogate the defendant for the purpose of ascertaining what property or effects that belonged to him, or in which he had any interest, at the time of filing the bill, were in his possession, or under his control.

It is, at least, doubtful, whether the receiver himself had the power, under any clause of this order, to examine the defendant, or any other person, as a witness, for the mere purpose of ascertaining whether the defendant had not made a fraudulent sale of his property previous to the filing of the complainants' bill. There is no statutory provision authorizing such a receiver to set aside, or avoid such a sale; where the defendant himself, at the time he was directed to assign to the receiver, would not have had the right to do so. The statute only makes the fraudulent sale or transfer void as to the creditors who are intended to be defrauded. And where the property is not in the possession of the defendant, so as to make it his duty to deliver it up to the receiver, leaving the fraudulent assignee, or grantee, to come in and be heard *pro interesse suo*, the proper course for

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the complainant is to make the grantee, or assignee, a party to his suit; so as to have the receivership extended to him. (*Casileur v. Simons*, 8 *Paige's Rep.* 273; *Edmeston v. Lyde*, 1 *Idem*, 637.) The order of reference in this case, although it appears to be a printed form, is not drawn in conformity to the principles settled by this court in the case of *Hopkins v. Wemple*, in 1838, which are briefly referred to in *Browning v. Bettis*, (8 *Paige's Rep.* 571.) The rules of the court make ample provision, and prescribe the substance of the order or decree, where the defendant suffers the bill to be taken as confessed against him, for want of appearance; or where he gives a written consent, in the form prescribed by the 191st rule. But no directions are contained in the rules, as to the form of the order of reference to appoint a receiver, upon a creditor's bill, where the defendant appears but does not give the consent mentioned in the 191st rule. The general powers and duties of such receivers are indeed prescribed in some of the rules of the court, and the order need not therefore specify any of such powers or duties. The order, in cases which are not specifically provided for in the 191st rule, should be so drawn as to allow the complainant to have a proper receiver appointed; and so as to enable the master to ascertain the amount and sufficiency of the security to be taken from such receiver. It should also be in such form as to enable the complainant, under the direction of the master, to compel the defendant to assign, and deliver over to the receiver, all the property, effects, and choses in action that belonged to him, or in which he had any beneficial interest, at the time of the commencement of the suit; and which are still in his possession, or under his control, so that it is in his power to comply with the order of the court to deliver them to the receiver. To effect these several objects, the complainant should have the power to examine the defendant, and other persons, on oath before the master, as to any fact, or matter, which properly arises upon such reference. Thus; to enable the master to determine the amount of the bond and security which is to be given by the receiver, it is necessary that he should ascertain the probable amount of the fund which will come into his

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hands as such receiver. And for this purpose, the complainant should, by the order, be authorized to examine the defendant and others upon oath, not only as to the nature and value of the property which is actually in the possession and under the control of the defendant himself, but also of that in which he had an interest at the time of the commencement of the suit; although it may, at the time of such examination, be in the hands or under the control of others, so that the defendant himself cannot be required to deliver it to the receiver. But after the receiver has been appointed, and has given the requisite security, all that the complainant has a right to ascertain, either by the examination of the defendant, or others, upon the reference, is as to the nature and particulars of the property, &c. of which the defendant has the possession or control; or of which he had such possession, or control, at the time to which the order of reference relates. For the whole object of this part of the examination, and of the proceedings before the master, on the part of the complainant, is to enable the master to decide and direct what property the defendant shall assign and deliver to the receiver, or shall authorize the receiver to take possession of, so far as the defendant himself is able to give such authority.

The order of reference, therefore, in cases not provided for by the 191st rule, should authorize the master to appoint a receiver of all the property, equitable interests, things in action and effects, which belonged to, or were held in trust for the defendant, or in which he had any beneficial interest, at the time of the commencement of the suit, except such articles of personal property as are exempt by law from sale on execution against such defendant; and direct him to take from such receiver the requisite security for the faithful performance of his trust. It should then require the defendant to assign to such receiver, under the direction of the master, all such property, equitable interests, things in action and effects, or such parts or portions of the same as are in his possession, or under his power and control. And such order should also direct that the complainant have leave to examine the defendant or any other person on oath, before the master, for any of the purposes of the reference; and also to compel the produc-

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tion of such books and papers as the master may deem necessary. Under an order thus framed, the complainant's solicitor will be able to obtain from the defendant in the suit, and from other persons whom he may think proper to call before the master as witnesses, any information in their power which is relevant to the subject matter of the reference. But he will not be authorized by such an order to examine the defendant, or any other person, as to other matters which have nothing to do with the appointment of the receiver, or with the ascertainment of the possession, nature, situation, value, character, or other particulars, of the property, which is to be assigned to the receiver, or to be delivered to him by the defendant.

The order, in the present case, does not in terms authorize the examination of third persons as witnesses, before the master, upon the application of the complainants, as to the property which the defendant is directed to assign and deliver over to the receiver. Yet it is undoubtedly sufficient to authorize a full examination of the defendant himself on that subject. The defendant, therefore, was not only bound to answer the direct question, what property, equitable interests, and things in action, and effects, he owned or had a beneficial interest in, at the time specified in the order of reference, but every other question which might indirectly aid in the ascertainment of the fact as to what property was owned by him at the time of the commencement of the suit, or what property was then held by others, in which he had any beneficial interest. And he was also bound to answer and disclose whether such property was in his possession, or under his control, at the time of such examination, so as to be the proper subject of an order or direction of the master that he should deliver the same to the receiver. It is not sufficient, then, that the defendant should answer generally that he had no property, or no property other than that specified by him in his answer to the general question. For, upon a more minute and particular examination of the facts, it may turn out, as it did in the present case, that the defendant's general answer was erroneous; that he was under a mistake in supposing that he had no property at the time of the commence-

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ment of the suit, as he stated in answer to the complainants' first question ; and that he was also under a mistake in supposing that he had no other property except the particular articles mentioned in his answers to the fourth and fifth questions propounded to him. One way of ascertaining whether the defendant had property, or any interest in property, at the time of filing the complainant's bill, is by inquiring what property he had shortly previous to that time, and what has become of it. And if the defendant answers that he had sold it, absolutely, before the commencement of the suit, he may be asked what was the consideration of the sale, and how it was paid or secured ; for the purpose of ascertaining whether the proceeds of the sale, or some part thereof, were not in his hands, or still due to him, at the time of filing the bill, or at the time when he was required, by the order, to assign and deliver over his property to the receiver. But if the defendant shows that the property had been absolutely sold or assigned and paid for, or that the payment thereof was provided for previous to the filing of the creditor's bill, the complainant is not at liberty to question the defendant as to the object and motive of such sale or assignment ; for the mere purpose of ascertaining whether it was not intended to defraud creditors. Such an inquiry is irrelevant to the purpose of the reference. For the defendant himself, in that case, has no interest in, or control over, the property which is not in his possession ; and he cannot, therefore, be required to deliver it to the receiver, under the order.

In the present case, many of the questions propounded to the defendant, and overruled by the master, were proper ; for the purpose of ascertaining what property, if any, the defendant held such an interest in, or control over, as to make it the legitimate subject of assignment and delivery to the receiver, under the order of the court. Particularly, the defendant should have been required to answer what property he had shortly previous to the filing of the bill ; and if he had any, what had become of it ; and if he had sold it, how it had been paid for, or whether the purchase money was still due to him ; and if paid for, what had become of the proceeds of the sale, &c. He should also have been required to answer whether he had disposed of any prop-



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erty which was in his possession at the time of filing the complainants' bill ; and if so, what property ; and what interest he had in such property at the time of the filing of the bill ; and what had become of the proceeds of the sale thereof. And he should have been required to state the particulars of the mortgages of the property which he owned and had possession of at the time the bill was filed, and of the amount still remaining due thereon ; instead of stating his belief merely, that the property mortgaged was not worth more than the amount of the incumbrances, without stating what that amount was, and when it was due and payable. He should also have been directed, by the master, to assign such mortgaged property to the receiver, if he had not already done so ; and to deliver up to the receiver so much thereof as still remained in his possession, or under his control, to enable the receiver to pay up the mortgages and redeem the property if he thought proper to do so, or to sell the same subject to what was due upon the mortgages.

The order appealed from must, therefore, be reversed ; and the application for a further examination of the defendant, upon the principles above stated, must be granted. And the complainants' costs upon this appeal, as well as upon the application to the vice chancellor, must abide the event of the suit.

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BEATTY vs. MCNAUGHTON.

Upon the argument of a cause before a vice chancellor, it is the duty of each party to furnish his opponent with a copy of his points, and also to have a copy marked by the clerk.

Copies of the points made by each party, upon the hearing before the vice chancellor, should be furnished to the chancellor upon the appeal.

THIS case coming on to be heard, upon an appeal from a decree of a vice chancellor,

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*M. Fairchild*, for the appellant, objected that the court had not been furnished with a copy of the points made, and relied upon by the appellant, on the argument of the cause before the vice chancellor.

*C. L. Allen*, for the respondent.

THE CHANCELLOR said it was the duty of each party, on the argument of a cause before a vice chancellor, to furnish his opponent with a copy of his points. And that a copy should also be handed to the court, and marked by the clerk; so that the other party can furnish a copy thereof, for the use of the chancellor, upon the appeal. He said it was frequently important that the appellate court should know what points were made in the court below; and that a copy of the points insisted upon by each party, before the vice chancellor, should be furnished to the chancellor upon the appeal.

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HIGBIE vs. BROWN.

Where a defendant has submitted to the exceptions taken to his first answer for insufficiency, or they have been allowed by the master, upon a reference thereof, it is too late for him, upon a reference of a second or third answer upon those exceptions, to insist that the original exceptions were not well taken, and that the further discovery called for is immaterial.

Where a master reports that an answer is insufficient in the matters of several exceptions thereto, and the defendant takes but one general exception to the report, such exception cannot be sustained if the answer is insufficient as to the matter of either of the exceptions allowed by the master. And this principle applies to the case of a second answer referred upon the original exceptions, and reported insufficient in the matters of several of those exceptions.

And it seems this principle also applies to the case of an exception to a master's certificate allowing several interrogatories, for the examination of a defendant.

Where either of the exceptions to an answer has been fully answered, and the master reports that the answer is insufficient in the matter of that and of other exceptions, the defendant should only except to so much of the master's report as

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certifies that the answer is insufficient in respect to the exception which is fully answered.

A defendant may take one general exception to a master's report, so far as it is against him. But he does it at his peril, if it is found that his exception covers too much.

Where the defendant's third answer was reported insufficient, and his exception to the master's report was overruled with costs, the defendant was directed to pay those costs within twenty days, or, in default thereof that the bill should be taken as confessed. The court also ordered an attachment to issue against him, as authorized by the 64th rule, for his contempt in not fully answering; and decided that, upon the return of the attachment, the complainant would be entitled to an order that the defendant be examined upon interrogatories, and that he be committed until he has answered such interrogatories, and paid the costs.

In such a case the complainant is not entitled to an order to commit the defendant, and that he answer interrogatories, immediately upon the filing of the report of the insufficiency of the third answer. But he must wait until the time for excepting to the master's report has expired; or until the decision of the court thereon, if the report is excepted to. And he must then proceed by attachment, to bring the defendant into court, to answer for the contempt; before he can obtain the order for commitment of the defendant until he pays the costs and answers the interrogatories before the master.

Where a defendant is ordered to be examined upon interrogatories, before a master, upon a report that his third answer is insufficient, he is not entitled to answer the interrogatories by written answers to be drawn up by his counsel. But he must attend and be examined personally by the master; who is at liberty to repeat the interrogatories until he is satisfied that they are fully answered by the defendant.

Where a second or third answer is referred for insufficiency, upon the matters of several exceptions, if such answer is eventually decided to be sufficient in the matter of either of the exceptions as to which it is referred, the complainant is not entitled to the costs of the reference.

THIS case came before the court upon an exception to the report of a master, as to the sufficiency of the defendant's third answer. The complainant took five exceptions to the original answer of the defendant; all of which exceptions were submitted to, or allowed. The defendant thereupon put in a further answer; which answer was reported insufficient in the matter of all the exceptions except the first. He then put in a third answer, which answer the complainant referred, as being still insufficient in the matters of the second, third, fourth, and fifth exceptions. The exception master reported the third answer sufficient in the matter of the fifth exception, but that it was insufficient in the matters of the second, third, and fourth exceptions. To this

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report, the defendant took one general exception; that the master had certified and reported that the third answer was insufficient in the matters contained in the second, third, and fourth exceptions, whereas he should have certified that the said answer was perfect and sufficient in the particulars excepted ~~thereto~~.

*J. Lansing*, for the complainant.

*C. Stevens*, for the defendant.

THE CHANCELLOR. The defendant having submitted to the original exceptions, or the same having been allowed by the master upon a reference thereof, it is too late upon a reference of a second or third answer for insufficiency on those exceptions, to insist that the original exceptions were not well taken, and that the further discovery called for was immaterial. The objection to the form of the exception to the master's report appears to be valid. And if the answer of the defendant is insufficient as to the matter of either of the three exceptions specified by the master, in his report, this general exception to the report cannot be sustained, but must be overruled. Upon the argument, I had some doubts, whether the principle of the cases of *Candler v. Pettit*, (1 *Paige's Rep.* 427,) and of *Franklin v. Keeler*, (4 *Idem*, 382,) in this court, and of *Pearson v. Knapp*, (1 *Myl. & Keen*, 312,) and *Green v. Weaver*, (1 *Sim. Rep.* 434,) in the court of chancery in England, applied to the case of a second answer referred upon several of the original exceptions. Upon examination, however, the principle appears to be equally applicable to the case now under consideration, as to the report of a master upon the allowance of exceptions. And I find, that in England, it has been applied to the case of an exception to a master's certificate, allowing interrogatories for the examination of the defendant. (*Moore v. Langford*, 6 *Sim. Rep.* 323. *Cotham v. West*, 1 *Beav. Rep.* 380.) The master's report, that the answer is insufficient in the matter of the second, third, and fourth exceptions, is substantially an allowance of these three distinct exceptions to all the answers, which the defendant has put in, for insuffi-

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ciency in those respects. In other words, the master reports that the matter of neither of those exceptions is yet fully answered. And if either of them was fully answered, the defendant should have excepted to so much of the master's report as certified that the answer was insufficient, in the matter of the exception which was sufficiently answered. The defendant may indeed take one general exception to the report, so far as it is against him; and thus compel the court to look into the whole matter embraced in that part of the report. But he does it at his peril, if it is found that his exception covers too much. This answer is clearly insufficient in the matter of two of the exceptions, and I am inclined to think it is also insufficient as to the third; though I have not examined particularly as to that, it not being necessary in deciding upon this general exception to the report. Nor is it material to the rights of the defendant; as he must be examined upon interrogatories, under the provisions of the 64th rule, if this third answer is insufficient in the matter of either of the three exceptions. The defendant's exception to the report must therefore be overruled, with costs. And the defendant must pay such costs, including the costs of the order nisi to confirm the master's report, within twenty days after service of the copy of the taxed bill upon him, or his solicitor, or the complainant's bill of complaint in this cause may be taken as confessed. But the complainant is not entitled to costs upon the reference. For he did not succeed as to one of the exceptions upon which the third answer was referred; the master having reported the answer sufficient in the matter of the fifth exception. This case, although perhaps not within the letter, is clearly within the spirit and intent of the 63d rule; which rule denies costs of the reference to a party who does not succeed as to all the exceptions which are referred.

The complainant is also entitled to the further order, authorized by the sixty-fourth rule, for an attachment to bring the defendant into court, to answer for his contempt in not fully answering the complainant's bill, in conformity to the previous orders of the court. And upon the return of that attachment the defendant will be ordered to be examined upon interrogatories, before

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the master by whom this report upon his third answer was made, in reference to the several points embraced in the exceptions as to which the answer is reported insufficient. And he will be committed for his contempt until he shall have answered such interrogatories to the satisfaction of the master, and has paid the costs of such attachment and of the proceedings thereon. The only substantial difference between the sixty-fourth rule of this court, and that part of the orders of Cromwell's commissioners, on the same subject, which was adopted by Lord Clarendon in 1661, is the changing the order so far as to apply it to a third instead of a fourth answer, when reported insufficient; and adapting it to the provisions of our revised statutes relative to proceedings for contempts. Our rule also contains a provision for taking the bill as confessed, where the defendant does not render himself amenable to the process of the court; or where he neglects, or refuses to answer the interrogatories, to the satisfaction of the master, on being brought into court upon the attachment. The practice in England, under Lord Clarendon's order, is therefore applicable to this case, upon the return of the attachment; after the defendant appears or is brought into court to answer for his contempt. There, the order for commitment, and that the defendant answer the interrogatories, before the master, *in vinculis*, is made at once upon filing the report of the master certifying that the defendant's fourth answer is insufficient. Here the complainant is not entitled to the order to commit the defendant, and that he answer the interrogatories, immediately upon the filing of the report of the master that the third answer is insufficient. But he must wait until the time for excepting to the report has expired, or until the decision of the court thereon, if the report is excepted to. And then he must proceed by attachment, to bring the defendant into court to answer for the contempt; before he can obtain an order for commitment of the defendant, until he answers the interrogatories before the master, and pays the costs of proceeding to compel such examination.

It was settled, however, within four or five years after the adoption of Lord Clarendon's order, that the defendant ~~must~~

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attend before the master personally, and answer the interrogatories. (*Gower v. Lady Baltinglass*, *Turn. & Russ. Rep.* 193 n. 1 *Ch. Cas.* 66, *S. C.*) And the late Lord Chancellor Eldon, upon examining the orders made by Lord Clarendon, in the case of *Gower and Baltinglass*, decided that the defendant, instead of putting in written answers to the interrogatories, to be drawn up by his counsel, must attend before the master and be examined by him, personally, upon the interrogatories; and that the master was at liberty to repeat the interrogatories, or any of them, to the defendant, until he should be satisfied they were fully answered. (*Farquharson v. Balfour*, *Turn. & Russ. Rep.* 184.)

Although it was stated on the argument in the present case that the defendant was a nonresident, and his several answers appear to have been sworn to in the state of Illinois, the complainant is entitled to the usual order, as provided for by the sixty-fourth rule. But the defendant must have four months after the service, upon his solicitor, of notice of the issuing of the attachment, to the sheriff of the county of Albany, to surrender himself to such sheriff thereon; and the attachment must be made returnable upon some regular motion day after the expiration of the four months. The defendant is also to be at liberty to apply to the court, upon due notice to the adverse party, for an extension of the time, if necessary; or to dispense with the personal attendance of the defendant, and to permit him to put in written answers to the interrogatories, upon shewing to the satisfaction of the court that the personal attendance of the defendant before the master is impracticable. If, however, the complainant is willing to dispense with the personal examination of the defendant, and to permit him to answer such interrogatories in writing, upon oath, to be taken before any officer of the state where he resides, and who is authorized by the revised statutes to take affidavits to be used in courts of record here, the order may direct that the defendant answer the interrogatories, to be settled by the master, and that he obtain the certificate of the master that they are answered to his satisfaction, within two months after the service of a copy of the interrogatories as settled, and also pay

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the taxable costs of the proceedings on such order, within twenty days after service of a copy of the bill thereof as taxed, or that the complainant's bill in this cause be taken as confessed.

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## SHAW vs. McNish and others.

It was not the intention of the legislature, by the amendatory act to reduce the expense of foreclosing mortgages in the court of chancery, to give to the complainant's solicitor, for the mere institution of a foreclosure suit which is settled previous to a decree, the full allowance for costs prescribed by that act for the whole of the proceedings, in a foreclosure suit, where there is no defence.

The only effect which can be given to that act, in suits which are settled, or discontinued, before they have proceeded so far as to show whether a defence will be made by any of the defendants, is to limit the solicitor's fees; so that they shall not exceed the gross amount fixed, by the statute, for the whole proceedings when there is no defence.

As the acts of 1840 and 1841 have made no provision for compensation in such cases, the solicitor is entitled to have his costs taxed according to the general fee bill in other suits; subject to this limitation as to the gross amount.

Where the solicitor for the complainant, in a foreclosure suit, brings persons before the court, as defendants, whom he had no reason to suppose were necessary or proper parties, the taxing officer may inquire into the facts; and he should disallow all charges for extra costs, or for disbursements, on account of such unnecessary parties.

Nor will the taxing officer be precluded from doing this by the formal charge, in the bill of complaint, that such defendants have, or claim, some interest in the mortgaged premises, as subsequent purchasers or incumbrancers.

The heirs of a subsequent mortgagee are not necessary parties to a bill to foreclose a prior mortgage; the executor of the decedent representing his rights as second mortgagee.

THIS was an application for the re-taxation of the costs in a foreclosure suit. The bill was filed against the mortgagor and his wife, and fifteen other persons who were made parties as having some interest in, or lien upon, the mortgaged premises, subsequent to the giving of the mortgage. Soon after the service of the subpoenas, and before the bill had been taken as con-



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fessed against any of the defendants, Irwin Swain, one of the defendants, paid to the complainant's solicitor, the amount claimed to be due upon the mortgage, and offered to pay the taxable costs. The complainant claimed to have the costs taxed at the gross sum fixed by statute, in foreclosure suits, where the bill has been taken as confessed against all of the defendants. The defendants' solicitor, on the contrary, insisted that the complainant was only entitled to the costs of the services which had been actually performed, and at the allowances fixed by the fee bill; and that he should not be allowed for the costs of proceeding against several of the defendants who had no interest in or lien on the mortgaged premises, and who were unnecessarily and improperly made parties. The costs were submitted to the vice chancellor of the seventh circuit for taxation. He allowed \$30 for the solicitor's fees as to the two first defendants, and \$2,50 for each of the other fifteen defendants, in addition to the disbursements; although such allowance exceeded the amount of the taxable items, according to the general fee bill, for the services which had been performed.

*J. Thomas*, for the complainant.

*O. L. Barbour*, for the defendant.

THE CHANCELLOR. The act to reduce the expense of foreclosing mortgages in the court of chancery, as amended in 1841, has fixed the allowance for solicitor's fees for the whole proceedings in a foreclosure suit, where there is no defence. But the legislature never could have intended to give the whole allowance, there prescribed, for the mere institution of a foreclosure suit which should be settled without proceeding to a decree. The only effect, therefore, which can be given to that act, in suits which are settled, or discontinued, upon payment of costs, before the same have proceeded so far as to ascertain whether a defence will be made by any of the defendants therein, is to limit the amount of solicitor's fees; so that it shall not exceed the gross sum, fixed by statute, for the whole proceedings when there is no defence. And as the acts of 1840 and 1841

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have made no provision for compensation in such cases, the solicitor is entitled to have his costs taxed according to the general fee bill in other suits; subject to this limitation as to the gross amount.

It is the duty of the officer, upon taxation, to strike out all charges for services which were not necessary to be performed. (2 R. S. 653, § 5.) Where the solicitor for the complainant in a foreclosure suit, therefore, brings persons before the court, as defendants, whom he had no reason to suppose were necessary or proper parties, the taxing officer may inquire into the facts; and should disallow all charges for extra costs, or for disbursements, on account of such unnecessary parties. Nor is the taxing officer precluded from doing so by the formal charge, in the complainant's bill, that such defendants have, or claim, some interest in the mortgaged premises, as subsequent purchasers or incumbrancers.

It is sworn, in this case, that the complainant knew, previous to the commencement of his suit, that the mortgagor had conveyed all his interest in the mortgaged premises; although the purchaser had not caused his deed to be recorded. It is not stated, however, that the complainant was apprised of the real time when that deed was given; nor that the mortgagor's wife had joined in it, and acknowledged it in such a manner as to bar her contingent right of dower. It was, therefore, a proper precaution, on the part of the complainant's solicitor, to make the judgment creditors and the wife of the mortgagor parties to the suit. There was no necessity, however, nor any apparent excuse, for making the five children of Wales, the subsequent mortgagee, parties. The executor fully represented the rights of the decedent as mortgagee, and the heirs at law should not have been made defendants. The extra costs of making them parties must, therefore, be disallowed. Deducting those and other objectionable charges, from the bill of items as submitted to the vice chancellor, will leave \$44,31 as the taxable costs to which the complainant's solicitor is entitled.

Neither party is to have costs as against the other, upon this application for a re-taxation.

**McCOSKER vs. BRADY and others.**

[Affirmed, 3 Den. 610; How. Cas. 480; 1 N. Y. 214.]

Where a bill, for a partition, alleged that a pretended will, under which the defendants claimed title to a part of the premises, was invalid, and prayed that it might be annulled and cancelled, and declared void; or, in case the same should be decreed to be valid, then that the complainant might have a partition of the premises; Held that the prayer for a partition was inconsistent with the case made by the complainant's bill.

Held also, that if the complainant was ignorant whether the alleged devise to the defendants was valid or invalid, the statements in the bill, as well as the prayer for relief, should have been so framed as to present the case in a double aspect.

Frame of a bill with a double aspect, and a prayer for relief in the alternative; as the facts may appear.

A trust to receive the rents and profits of real estate, and to pay certain annuities to two sons of the testator, for five years, if they should so long live, and to pay the surplus rents and profits to one of them, is a valid trust, under the provisions of the revised statutes, and will continue for five years, notwithstanding the death of one of the annuitants within the five years; or until the trust is terminated by the death of the other annuitant within that period.

Where a valid trust as to real estate is created by will, the whole legal estate is vested in the trustees, so long as any of the valid purposes for which the trust was created continue; so that the *cestui que trust* will take no estate in the lands during the continuance of the trust.

If one of the three trustees named in a will dies, and the other two refuse to accept the trust, the trust devolves upon the court of chancery, under the provisions of the revised statutes.

Where a trust has devolved upon the court of chancery, the parties interested in the trust estate may apply to the court to have a receiver appointed to collect and preserve the rents and profits of the property until a new trustee is appointed.

Where a bill for partition is filed, and the complainant subsequently dies, and his devisee thereupon files a bill to revive and continue the proceedings in the original suit, it is no objection to this last bill that the complainant is an infant; and was therefore incapable of commencing an original suit for the partition of lands.

Such a bill, filed by a devisee, although it is so far an original bill that the validity of the devise may be contested thereon, is in reality a bill to revive and continue the proceedings in the original suit.

Under the 23d rule of the court of chancery, if the defendant, in such a suit, does not deny the validity of the devise, upon which the right of the new complainant, to revive and continue the original suit, and to have the benefit of the proceedings thereon, rests, such suit may be revived upon motion; without waiting to bring the new suit to a hearing upon such new matter.

Where the right of the devisee, to revive and continue the proceedings in the original suit, as the proper representative of the former complainant in such suit, is admitted, or has been established by a decree founded upon the new matter, the new complainant is entitled to the same benefit of those proceedings, so far as his inter-

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est as devisee is concerned, as if he had been in a situation to continue those proceedings by a simple bill of revivor.

The abatement of a suit does not discharge a receiver, who has been previously appointed in such suit.

Where a bill contains no statements which can entitle the complainant to a decree for a partition in the suit, the mere prayer for a partition, in a particular event contemplated by such prayer, does not render the bill multivarious.

THIS case came before the chancellor upon the separate appeals of J. R. Brady and J. T. Brady, two of the defendants in this suit, from a decretal order of the vice chancellor of the first circuit, overruling their several demurrers to the complainant's bill.

John McCosker the elder, on the 26th of March, 1839, died seised of certain real estate, in the city of New-York, particularly described in the bill of Thomas McCosker hereafter mentioned; and left his two sons, John McCosker the younger, and Thomas McCosker, his only children and heirs. By his will, made in 1834, he directed his executors, one of whom died in his lifetime and the other two of whom refused to accept the trust, to take possession of all his real and personal estate, except such as was bequeathed to his wife, and to sell the personal estate and to rent the real estate; and to receive the rents thereof for five years from the time of his death, and apply the same to the payment of his debts and the annuities specified in his will, and to pay over the balance to his son John, until the expiration of the five years. He then devised the whole of his real estate, after the expiration of the five years, except a house and lot in Houston-street which he subsequently disposed of in his lifetime, to his son John during his natural life, with remainder to his issue, in fee; and in case his son John should die without issue, then the said real estate was to go to the heirs of the testator's brother Thomas, who was then residing in Ireland. The testator then gave to his son John an annuity of \$200, to be paid quarterly, during the five years. He gave a similar annuity to his son Thomas during his natural life; to be paid to him by the executors quarterly, during the five years, and by his brother John or his heirs after that time. This will was duly proved as a will both of real and personal estate; and letters of administration, with

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the will annexed, were granted to John McCosker the younger. At the time of the death of John McCosker the elder, his only descendants, then living, were his two sons named in his will, and the complainant in the present suit; who was alleged to be the son and only child of the testator's son Thomas. Thomas McCosker, the brother of the testator, and whose heirs, by the terms of the will, were made the residuary devisees, in case of the death of John McCosker the younger without issue, was still alive, and had several children and descendants then living; but he and they were all aliens, and incapable of taking real estate in this state by devise or descent. And he and they continued to be so incapable at the time of the death of John McCosker the younger; who died in 1843, without issue, and unmarried, and without having sold his interest in the real estate of his father; leaving his brother Thomas and the complainant in the present suit, surviving.

On the 12th of March, 1844, and within five years after the death of his father, Thomas McCosker, the son of John McCosker the elder, filed a bill in this court, before the vice chancellor of the first circuit, against the complainant in the present suit and against Maria L. Brady, J. R. Brady and J. T. Brady, who were the defendants in the present suit, stating the before mentioned facts. That bill also stated that, in February, 1842, John McCosker the younger leased one of the lots in New-York, of which his father died seized, to C. Maas for three years from the first of May, 1842, at an annual rent of \$500; that the assignee of Maas was in possession of that lot under such lease, and was paying rent therefor to R. Martin, as agent for whoever was entitled to the same; and that the residue of the lots of which John McCosker the elder died seized, were in the hands of numerous occupants as tenants thereof, and from whom the rents could not be obtained without the constant attention of some person having all the powers of a landlord to collect the same. That bill further stated that the personal estate of the testator was all disposed of by John McCosker the younger, who at the time of his death did not leave sufficient personal property to pay his funeral expenses; and that the complainant, in that suit, upon the death

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of his brother, became entitled to the one half of the real estate of which the testator died seized, as one of the heirs at law of his father, and to the other half thereof as the heir at law of his brother John. That bill further stated that the defendant J. T. Brady propounded to the surrogate of New-York, for proof as a will of real and personal estate, an instrument in writing, dated in June, 1842, purporting to be the will of John McCosker the younger, and to have been executed in the presence of two subscribing witnesses, and disposing of his property as follows: "First, I direct that my debts and funeral expenses be paid as soon as possible after my decease. Secondly, my brother Thomas is entitled, under my father's will, to an annuity of \$200 during his life. I give him, in addition, an annuity of \$500 during his life, and direct that after his death, the same amount, that is \$500, be annually paid to his son John Andrew, for life. Thirdly, I give and bequeath to the Roman Catholic Orphan Asylum of the city of New-York, whatever be its corporate name, \$500. Fourthly, I give, devise, and bequeath the residue of my estate, real and personal, to John Riker Brady and Maria Louisa Brady, as tenants in common forever. Fifthly, if my said brother Thomas McCosker, or his son, after my decease, shall commence any suit or proceeding to destroy or impair this my will, or any provision or intention thereof, his right to any share or interest in my estate shall thenceforth cease and determine, anything herein before contained to the contrary notwithstanding. Lastly, I appoint Robert Martin and James T. Brady, executors, &c." That bill further stated that Martin declined to act as executor, but that the other executor named in the said pretended will claimed to act as such executor; that Thomas McCosker, the complainant in that bill, opposed the proof of the instrument propounded before the surrogate as the will of John McCosker the younger, and that the question as to its validity was still pending and undetermined before the surrogate. That bill further stated that in consequence of the doubt thrown upon the title of the complainant therein, by the said pretended will, his friends, in his absence and without his knowledge or consent, united with the said J. T. Brady, who assumed to act as the

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friend of the claimants under that pretended will, in requesting Martin to take the control and management of the property and receive the rents thereof, as the agent for whoever might be entitled thereto, and that he accordingly assumed such agency, and was continuing to act and to receive the rents of the property as such agent; and that all the objects of the trust term of five years created by the will of John McCosker the elder had been satisfied, except as to the annuity of \$200 to the complainant in that suit. That bill further charged that John McCosker the younger, in consequence of intemperate habits and an impaired intellect, was under the influence and control of the defendant James T. Brady, who was his attorney and agent in relation to the management of his property and the collection of his rents, &c.; and that Brady took an improper advantage of his situation, to procure the said pretended will to be made in favor of his own brother and sister, who were in nowise related to John McCosker the younger, either by blood or marriage; and that his alleged will was wholly void, so that he died intestate. That bill further stated that the lands in question were worth about \$3000 a year; that no part of the complainant's annuity had been paid to him since his brother's death, except the one half of the rents of the property which he had received from Martin; that the residuary devisees named in the pretended will, were destitute of property; and that neither of them was in the actual possession or occupation of the lands in question or any part thereof; by themselves or their tenants, or in the receipt of the rents or profits. The complainant, in and by that bill, claimed and insisted, that the said pretended will was a cloud upon his title, and that it should be declared void by a decree of this court, and that the residuary devisees named therein should be perpetually restrained from asserting any claim to the lands in question under the same; and that in case it should be decided to be a valid will, such complainant was entitled to be paid the arrears of his annuity, under the will of his father, and also the annuity of \$500 given to him by the said pretended will of his brother. He also insisted that, in the case last supposed, he was still seized of one undivided half of the lands in

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question, by descent from his father; and that the residuary devisees in the will of his brother were each seised in fee of one quarter thereof, under such will, subject to one fourth of the \$200 annuity given to him for life by the will of his father, and to one half of the \$500 annuity given to him by the alleged will of his brother, and that no other person was interested in the said lands except the assignee of the lease for three years given to Maas. He thereupon prayed for an answer without oath, and that a receiver of the rents and profits of the premises might be appointed, to take charge of the same pending the litigation, and that the pretended will of John McCosker the younger might be declared void, and might be decreed to be delivered up and cancelled, &c.; or in case the same should be held to be valid, that then a partition might be made, in such a manner as to protect the equitable rights of the assignee of the lease given by John McCosker to Maas, and that provision might be made for the payment or security of the annuities to the complainant in that bill; and that he might have such further or such other relief in the premises as the nature of the case might require, &c.

The several defendants in that bill, being served with process of subpœna, appeared therein. John Andrew McCosker, the complainant in the present suit, and Maria L. Brady, being infants, put in general answers by their respective guardians; and the defendant J. T. Brady demurred to the bill. J. R. Brady put in an answer, in which he admitted that John McCosker, the elder, died seised of the lands in question, and that he devised the same in the manner stated in that bill; that the complainant, in that suit, was the sole heir at law of his father and brother; and that the contingent limitation over of the lands in question, by the will of John McCosker the elder, to the heirs of his brother Thomas, then residing in Ireland, was void. But he denied that the complainant in the present suit was a son of the complainant in that suit, or that the complainant in that suit was entitled to the lands in question, or to any part thereof, by descent or otherwise. He also denied that the alleged will of John McCosker the younger, was invalid, but



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insisted that it was valid, and vested in him and his sister a good title to the whole of the lands in question. A replication to that answer was filed; and a receiver of the rents and profits of the lands in question was appointed, under an order of the vice chancellor, made in that suit, in April, 1844; and the tenants were directed to attorn and pay over the rents and profits of the premises to such receiver. Before any further proceedings were had in that suit the complainant therein died.

In October, 1844, John Andrew McCosker, who is still an infant, filed his bill in this cause, by his next friend, before the same vice chancellor; stating the filing of the bill in the before mentioned suit, the charges and allegations contained therein, the prayer thereof and the proceedings in that suit, and the subsequent death of the complainant therein, as before mentioned. The bill in the present suit further stated, that all the matters stated in the said bill of Thomas McCosker were true; that the said Thomas by his will devised all his real estate to the present complainant; in which devise was included all the right, title and interest of the said Thomas, the father of the present complainant, in and to the lands in the former bill mentioned; and that the matter of proving the said pretended will of John McCosker the younger was still pending, before the surrogate, and undetermined. The bill in this suit further stated, that by the death of Thomas McCosker the former suit abated, but that the complainant in the present suit was advised and believed that he, as such devisee, and as sole heir at law of the said Thomas, was entitled to have the said pretended will of John McCosker the younger, annulled and cancelled, and declared void, &c. as prayed for in the said original bill; or in case the same should be decreed to be valid, then that he, as such devisee and heir of the said Thomas, was entitled to a partition of the premises, and to have the annuity of \$500 secured to him; and if such partition could not be had in this suit, that he was entitled to have and receive one half of the rents and profits of the premises in question from the time of the death of the said Thomas McCosker. He therefore prayed for the relief thus claimed, and that he might have

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against the defendants in the present suit the benefit and advantage of the original suit; and that he might have such further and additional relief, or other and different relief, as should be agreeable to equity.

The appellants put in separate demurrers to the whole bill, stating therein several special causes of demurrer.

*H. F. Clark*, for appellants. The bill is multifarious. 1. It presents a claim against all the defendants to have the will set aside. 2. It prays a decree for partition against John R. and Maria Louisa Brady. In this subject matter James T. Brady has no interest. He would not be a proper party to a bill legitimately filed for partition alone. 3. The complainant prays relief in different capacities and rights; under his father as devisee of John McCosker the elder, and against his will; and as legatee of John McCosker the younger, and against his will. The prayer for the securing of the annuity relates to a subject matter in which the defendant James S. Brady has no interest. 4. It appears from the bill that the complainant is not in possession of the premises; and there is no allegation that the parties are seised as tenants in common. (*Johnson v. Johnson*, 6 *John. Ch. Rep.* 163. *Mulock v. Mulock*, 1 *Edw.* 14. *Pomeroy v. Pomeroy*, 1 *John. Ch. Rep.* 606. *West v. Randall*, 2 *Mason*, 181. *Stewart's heirs v. Coulter*, 4 *Rand.* 74. *Boyd v. Hoyt*, 5 *Paige*, 65. *Colton v. Ross*, 2 *Id.* 396. *Lloyd v. Brewster*, 4 *Id.* 537. *Fellows v. Fellows*, 4 *Cowen*, 682. *Story's Eq.* § 254, 271.)

The bill prays inconsistent relief, founded on cases which are inconsistent with each other. 1. If the facts stated in the bill be true, partition cannot be decreed. 2. The state of facts which will justify partition is wholly incompatible with a decree setting aside the will.

The court of chancery has no jurisdiction to set aside a will of real estate on the ground of the incapacity of the testator. Although this jurisdiction may have been sometimes exercised, and an issue of *devise* *it vel non* awarded, it has only been in cases where the defendants submitted without objection, to the

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jurisdiction claimed. If there be no submission, the only remedy of the heir at law who claims against a will is by an action at law. There his remedy is perfect. (1 *Story's Eq.* 194, 213, 421, 2, 672, n. 1 *Forb. Eq.* 233 and notes a, x. *Bowen v. Riley*, 6 *Paige*, 46. *Colton v. Ross*, 2 *Id.* 396. An infant cannot file a bill for the partition of real estate (2 *R. S.* 317, § 1.)

If the court has any jurisdiction over this cause, it cannot be exercised upon the case made by this bill. The suit commenced by Thomas McCosker, absolutely and totally abated on his death. The present complainant should therefore have filed an original bill in the nature of a bill of revivor. (2 *Barbour's Ch. Prac.* 36.)

If it is insisted that the bill in this case is a bill of revivor, the appellants submit that such a bill cannot be filed by a defendant until after a decree in the original suit entitling him to an interest in the further continuance of the suit. (*Souillard v. Dias*, 9 *Paige*, 393. 2 *Barb. Ch. Pr.* 41.)

The prayer for an account of the rents and profits which accrued before the decease of Thomas McCosker cannot be sustained. And the bill, so far as relates to this prayer, was demurrable; because such an account can only be enforced by the personal representative of the decedent. (*Hoffman v. Treadwell*, 6 *Paige*, 308.)

No facts are stated in the bill which justified the making of James T. Brady a party to the suit. And no decree or relief is prayed for, as against him. (*Mitf.* 160. *Smith v. Snow*, 3 *Madd. Rep.* 10. 2 *Story's Eq.* § 1499. *Kitch v. Dalton*, 8 *Price*, 12.)

C. O'Connor, for the respondent. The bill filed by Thomas McCosker was well framed as a bill in two aspects; each of which presented a proper ground of relief in equity. The primary aspect, i. e., relief against the pretended will of John McCosker the younger, was well founded. 1. The lease to Caarsten Maas was an impediment to ejectment, and therefore a bill was maintainable. (*Pemberton v. Pemberton*, 13 *Ves.*

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299. *Jones v. Jones*, 7 Price, 666; S. C. 3 Meriv. 131, and case in note. 1 Sch. & Lef. 430. 3 Ves. sen. 286. Ambl. 429. 1 Atk. 540. 2 Chit. Dig. 1055, tit. Practice, injunction 16. *Armitage v. Wadsworth*, 1 Madd. 110.) 2. The trust term of five years created by his father's will and yet unexpired, was a subject of equity cognizance, and entitled him to relief here. 3. The premises not being in the actual possession of the defendants, or any one holding under them, he had a right to a receiver pendente lite; the defendants being irresponsible, and the loss of rents irremediable. (*Powis v. Andrews*, 3 Bro. P. C. 505. 6 Ves. 172. 2 Ves. & Beam. 87 to 96.) 4. Ejectment would not lie against the defendants; and the pretended will is a cloud upon the title which a court of law cannot remove. (*Messerole v. Brooklyn*, 8 Paige, 209. 26 Wend. 137. *Briggs v. French*, 1 Sumn. 505.) The rule that chancery will not take cognizance of a simple bill to set aside a will of real estate is inconvenient and anomalous. (5 Ves. 646. 1 Story's Eq. § 440.) No effort should be made to enlarge it; but slight circumstances of equity should be held to take cases out of it. (See note to 1 Munf. 554.) Certainly J. A. McCosker could not bring a suit against the receiver.

A prayer in the alternative, for partition in case the will of John McCosker the younger should be adjudged to be valid, was not inconsistent with the prayer to set that will aside. 1. Secondary or alternative relief, arising out of matters stated in the bill, though it be altogether inconsistent with the relief primarily sought, may be granted; provided an appropriate alternative prayer be inserted. But the court would not grant, under the prayer for general relief, a special relief inconsistent with the special relief prayed for; although a sufficient case should appear in the bill; for this would lead to surprise. (*Colton v. Ross*, 2 Paige, 396.) 2. Where, however, the alternative prayer is inserted, and without a perversion of truth the complainant is able to present a case requiring one or the other of the opposite kinds of relief, the court may take the proofs and award the one or the other relief as justice may require. (*Ellis v. Ellis*, 1 Dev. Eq. Rep. 398. *Stapleton v. Stapleton*, 1 Atk. 6.) The

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inconsistency for which bills have been condemned as being not properly in the alternative, is of the most absolute kind. (*Lloyd v. Brewster*, 4 Paige, 540, 41. *Grimes v. Day*, 2 Atk. 142.) If this bill does not properly present an alternative case for relief; then for that very reason it is not multifarious. Defendants should have demurred to the latter prayer. (*Varick v. Smith*, 5 Paige, 160.) The technical difficulty of misjoinder does not exist in chancery. The question there is, can the matters be conveniently disposed of in one suit? (*Story's Eq. Pl.* § 539, 538, 537. *Gaines v. Chew*, 2 How. R. 642.) It is convenient to settle a question of title preliminarily, in the same suit which seeks a consequent partition. (*Wilkin v. Wilkin*, 1 John. Ch. Rep. 117.) The statute relating to partition contemplates an amendment of the bill after trial and ascertainment of facts. (2 R. S. 320, § 20, 21, 79.) James T. Brady is a proper party under the first head of relief; because 1st, he is charged with unfairly procuring the will; and 2dly, he has control of the paper, which may be directed to be delivered up and cancelled. He is a proper party under the second head, as executor; to answer the allegation that there are no personal assets to pay the \$500 legacy. If he were omitted the devisees might demur. (*Ram on Assets*, 204. *Rhoades v. Rudge*, 1 Sim. 79. 7 Paige, 647.)

The complainant John A. McCosker had an undoubted right, as heir at law of Thomas McCosker, to file a bill of revivor. (*Spencer v. Wray*, 1 Vernon, 463.) But in so doing he could not have availed himself, in any degree, of the will of his father. (2 Madd. Ch. 402.) For in case his legitimacy was successfully questioned, his character of devisee would not avail to sustain his bill of revivor. A devisee cannot file a bill of revivor, or pray to revive the suit of his devisor. (*Douglass v. Sherman*, 2 Paige, 361. *Mitford*, 79, sub. 7, 8. *Story's Eq. Pl.* § 379, 380. *Mitf.* 71. 1 Cas. in Chan. 174.)

The original bill in the nature of a bill of revivor, differs from a bill of revivor in this, that it is purely a new suit; it never revives the proceedings in the first suit, but merely carries the benefit of them into the new case; and in practice it is marked with the following distinguishing traits: 1. A bill of revivor

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states merely the prayer of the first bill, and the abatement (*Willis' Pl.* 145.) But the original bill in the nature of a bill of revivor reiterates in detail all the statements of the first bill; for the bill being a new suit, the complainant must show his title to the relief, as well as to the benefit of the former proceedings. (*Willis' Pl.* 394, and notes.) 2. No order of revivor is ever made; but at the hearing of the second suit the circumstance of there being two suits instead of one, adds three lines to the decree. (*Clare v. Wordell*, 2 *Vernon*, 548. *Id.* 672.)

In the present case John A. McCosker has filed the proper bill. 1. He cannot be, in judgment of law, both heir and devisee; nor could the fact of his being devisee be admitted by way of supplement, or otherwise, into a bill of revivor, to aid his case. 2. Even as heir at law, he may be permitted, in the discretion of the court, to waive the more simple remedy of a bill of revivor, and to prosecute his claim, by original bill in the nature of a bill of revivor; and where, as in this case, he shows that his evasive adversary disputes his heirship, evidently for delay and vexation, he offers a good reason to the court for filing a bill, of essentially the same character, and leading to the same consequences as a bill of revivor, in which his title by inheritance or by devise may both be presented. (*Mitf.* 97, § 7.) 3. If the last proposition is erroneous, and an heir at law cannot, under any circumstances, be permitted to obtain the benefit of the existing suit of his ancestor except by bill, then the complainant has mistaken his remedy. But the demurrer, so far from objecting to the course adopted, supposes the bill to be a simple bill of revivor, and demurs for that cause. 4. It is not improper, except as an idle piece of repetition and surplusage, to reiterate, in the original bill in the nature of a bill of revivor, the facts stated in the first bill: for the second bill is in truth founded upon the facts stated in the original bill, and not like a bill of revivor, merely upon the first bill itself. 5. There seems greater difficulty in carrying the old suit into the new in this sort of bill, than in a pure bill of revivor; but it is only in the seeming. For just such a bill as the present would well lie in this case, if J. A. McCosker

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was a devisee only; and in such case the difficulties in question would appear, to the same extent. (1 *P. Wms.* 266.)

The prayer of this bill is strictly right in omitting any prayer to revive. (*Willis' Eq. Pl.* 394. *Van Heythuysen's Eq. Draughtsman*, 348.)

The averment that the facts stated in the original bill were true, is proper enough in an original bill; though not in a bill of revivor. 1. If the defendant had already answered them, he could very shortly say so in his answer to this bill. 2. If he had not answered them, twenty statements of the same fact, in the same words, are as easily answered as one statement.

If there are any technical defects which would render the bill demurrable, the defects are not reached by the present demurrer; and the most the court can do, is to modify the order by allowing a demurrer *ore tenus* for these causes, permitting the complainant to obviate such demurrer by amendment, and charging the defendants with all the costs of the demurrer and appeal. (3 *Paige*, 453. *Id.* 232. *Baker v. Mellish*, 11 *Ves.* 72. *Johnson v. Anthony*, 2 *Moll. Rep.* 373.)

THE CHANCELLOR. Neither the original bill, of Thomas McCosker, nor the bill in the present suit, is properly framed, to entitle the complainant to a partition of the lands in controversy, in case it should turn out that the alleged will of John McCosker the younger is valid. In both bills it is distinctly charged that the will is void; and that the whole title and interest in the lands became vested in T. McCosker, as heir at law of his father, as to one half, and as the heir of his brother as to the other half thereof, upon the death of the latter. The prayer for a partition, therefore, in case the pretended will shall be found to be valid, is wholly inconsistent with the case made by these bills. If the complainant was ignorant whether the alleged devise, to the defendants, was in fact valid or invalid, and wished to obtain the proper relief as that fact should ultimately appear to be, he should have framed the statements in his bill, as well as the prayer for relief, so as to present the case in a double aspect. That is, if he was in a situation to entitle him to one

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kind of relief, in this court, in case the alleged will was invalid and a cloud upon his title, and to another kind of relief here, by partition, in case the will was valid, and if the situation of the case was such that he could not ascertain the fact upon which his right to one kind of relief or the other depended except by a discovery from the defendants or by an issue of *devisavit vel non* to be awarded by this court, he should, instead of alleging that the will was void, have stated that he was ignorant whether it was valid or invalid; and should have showed that he was not in a situation to have that question settled by a suit at law. And he should then have prayed that the question might be settled under the direction of this court; and that he might have the relief to which he might be entitled, in the alternative. In examining the question, therefore, whether the demurrers are well taken, the court must proceed upon the supposition that it will eventually be found that the allegations in this bill, that the will was invalid, are true; and that the same was procured to be executed by fraud, or undue influence exercised over John McCosker the younger, as stated in the original bill, and as reasserted in the bill of the present complainant.

In the case of *Colton v. Ross*, (2 *Paige's Rep.* 396,) it was decided that this court had no jurisdiction, and would not entertain a suit, to set aside a will of real estate, upon the ground that it was obtained by fraud, or that the alleged testator was incompetent to make a will, where the complainant had a perfect remedy at law. But at the time of the filing of the original bill by T. McCosker, in the case under consideration, he had no such remedy at law. For, he was not then in possession of the premises in question, or of any part thereof. Nor was he entitled to the possession during the continuance of the trust term, of five years, created by the will of his father; which term had not then expired. So that he could not have sustained an action against the tenants, to recover the rents, or an ejectment suit against any one who was wrongfully in possession.

The trust to receive the rents and profits, and to pay the annuities to the two sons for the five years, if they should live so long, and to pay the surplus to John, was a valid trust un-



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the provisions of the revised statutes, and continued, notwithstanding the death of John, for the five years, or until it was terminated by the death of Thomas within the five years. For if the trust was valid, the whole legal estate was vested in the trustees, so long as any of the valid purposes for which the trust was created continued; and the cestuis que trust could take no estate in the lands during the continuance of the trust, (1 R. S. 729, § 60,) and the interest of the cestui que trust was inalienable in the mean time. Although one of the trustees died, and the other two refused to accept the trust, the trust itself devolved upon this court, under the provisions of the revised statutes. (*King v. Donnelly*, 5 Paige Rep. 46.) It was a proper case, then, for the complainant in the original bill to come into this court, upon which the trust had devolved, to have a receiver appointed to collect and preserve the rents and profits, and to have the question as to the invalidity of the will determined; so that a proper decree might be made for the payment of the whole rents and profits, which might come into the hands of such receiver, to the complainant in that bill, as well as the annuity to which he was unquestionably entitled under the will of his father. The original bill, therefore, appears to have been properly filed. And if the complainant therein had not died, I think this court would have been authorized to direct an issue, to try the validity of the alleged will; and if the same had been found to be invalid, a decree might have been made, declaring its invalidity, so that it should no longer remain a cloud upon the title. The defendant J. T. Brady being charged with fraud and collusion in obtaining that will, in favor of an infant, who could not be properly charged with the costs of the proceedings to set it aside, appears also to have been a proper, though not a necessary party to the suit. For, he might be personally charged with costs in case the complainant should succeed. His demurrer to the whole of the original bill does not therefore, appear to have been well taken.

The questions arising under the present bill are somewhat different. At the time of filing this bill the trust term had expired by its own limitation, as well as by the accomplishment

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of all the valid purposes for which that trust was created. And although the question yet remains to be litigated, as to who is entitled to the rents and profits of the premises up to the time of the death of the complainant in the original bill, which rents are still in the hands of the receiver, or of R. Martin the original agent, the present complainant is not in a situation to litigate that question in this suit. Those rents and profits are now personal property, and belong to the personal representative of the deceased complainant, and not to his heir or devisee. But if the alleged will of John McCosker the younger is invalid, as charged in the bill, the legal as well as the beneficial interest in the whole premises, subject to the unexpired term in the lease to Maas, is now in the complainant; and he is entitled to the whole rents and profits, in the hands of the receiver, which have accrued since the death of Thomas McCosker, in May, 1844. On the other hand, if the alleged will is valid, the defendants, J. R. Brady and his sister, are each entitled to one undivided fourth of the premises, and to the rents and profits thereof since that time; for their own use and benefit. For, although an annuity of \$500 was, by the will, given to the brother for life, and to be continued to the present complainant, there appears to be nothing in that will which makes any of the legacies therein mentioned a charge, even by implication, upon the real estate devised to Brady and his sister.

If the original bill had been properly filed for a partition of the lands, it would be no objection to a bill filed by the devisee, to revive and continue the proceedings, that such devisee was an infant; and was therefore incapable of commencing an original suit for the partition of lands. For such a bill, filed by the devisee, although it is so far an original bill that the validity of the devise may be contested thereon, is in reality a bill to revive and continue the proceedings in the original suit. Under the 23d rule of this court, if the defendant in an original bill in the nature of a bill of revivor, or in an original bill in the nature of a bill of revivor and supplement, does not deny the validity of the devise upon which the right of the new complainant to revive and continue the original suit and to have the benefit

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of the proceedings therein, rests, such suit may be revived upon motion; without waiting to bring the new suit to hearing upon such new matter. And when the right of the devisee, to revive and continue the proceedings in the original suit, as the proper representative of the former complainant in such suit, is admitted, or has been established by a decree founded upon the new matter, the new complainant is entitled to the benefit of those proceedings, so far as his interest as devisee is concerned, to the same extent as he would have been if he had been in a situation to continue those proceedings by a simple bill of revivor. (*Mitf. Pl. 70. White on Rev. & Sup. 127.*)

When the original bill, in the present case, was filed by Thomas McCosker, the arrears of the annuity for \$200, given to him for life by the will of his father, remained unpaid from the time of his brother's death. Those arrears, as well as the part of the annuity which became payable afterwards, belong, as before stated, to the personal representatives of the original complainant; and not to the present complainant, as the devisee of the real estate. The latter, therefore, has the right to revive and continue the proceedings so far only as concerns the real estate, and the rents and profits thereof which have accrued since the death of the original complainant; and to obtain such relief as he may be entitled to in his character of devisee merely. If the suit, therefore, is to be further prosecuted in reference to the settlement of the right to the rents and profits which had accrued previous to the abatement, it must be revived by, or in the name of, the executor or administrator of Thomas McCosker. (*Hoffman v. Treadwell, 6 Paige's Rep. 308. White on Rev. & Sup. 81.*) If the original bill, however, was properly filed, for the purpose of having the question as to the invalidity of the pretended will of John McCosker the younger, settled under the direction of this court, there is nothing to deprive the devisee of the right to continue the suit for that purpose; although the existence of the trust term is now removed, and this complainant would probably have the right to file a new original bill for relief. For, considering the situation of the property, I do not see how he can institute any proceedings, at law, by which the

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invalidity of the pretended will can be established, so as to give him all his rights. The abatement of the suit did not discharge the receiver who had been previously appointed. (3 *Dan. Ch. Pr.* 225. 1 *Hogan's Rep.* 174.) No person, therefore, was in possession, against whom the present complainant could have brought a suit at law to try the legal title to the lands. Nor could any suit at law have been brought in which he could have recovered the rents, which had accrued subsequent to the death of the original complainant, either from the receiver himself, or from the tenants who had been directed to attorn to such receiver and pay their rents to him.

The form of the present bill appears to be right, with the single exception that it does not, in terms, pray that the original suit may be revived. (See *White on Rev. & Sup.* 129, 130.) But the frame of the prayer is such as clearly to indicate that the bill was intended to be filed as an original bill in the nature of a bill of revivor. For the complainant distinctly prays that he may have the benefit and advantage of the proceedings in the original suit; and the bill also contains a general prayer, for such other or different relief as the complainant may be entitled to, upon the case made by his bill. This mere technical defect in form, therefore, which is not alluded to in either of the demurrers, cannot avail the defendants anything. The objection that the complainant prays for an account of rents accrued previous to the abatement, if the bill does in fact contain such a prayer, formed no ground for a demurrer to the whole bill. And as the bill contains no allegations, or statements, which will entitle the complainant to a decree for a partition in this suit, in any event, the mere prayer for a partition, in an event contemplated by such prayer only, does not render the bill multifarious. (See *Many v. Beekman Iron Company*, 9 *Paige's Rep.* 194.)

The decision of the vice chancellor in overruling the demurrer as to each defendant, must therefore be affirmed, with costs; to be paid by the appellants, respectively, upon their several appeals.

## ALCOTT &amp; LEE vs. AVERY and others.

[Distinguished, 3 Barb. Ch. 363.]

Where a suit is commenced against a bankrupt, subsequently to his discharge, it is his duty to set up the discharge, as a defence; so as to give the adverse party an opportunity to impeach it, for fraud, if he wishes to do so.

A bankrupt must also set up the discharge, in a suit pending against him at the time it is obtained, as a bar to the further continuance of such suit, to obtain satisfaction of the debt from him personally, or out of his future acquisitions, provided the situation of the suit, at the time of obtaining such discharge, is such as to enable him to set up his discharge as a defence.

In cases of that kind the court will not relieve the bankrupt, where he has lost the benefit of his discharge by his own negligence.

But where a judgment or decree, obtained subsequently to the discharge, will be binding on the defendant, or his after acquired property, and where he has had no opportunity to set up such discharge, the court will grant him relief, upon a summary application.

In such a case, if the validity of the discharge is disputed, the relief granted is to put the parties in the way of trying the validity of the discharge; but without interfering, in the meantime, with the rights which the creditor has acquired by his judgment or decree.

It is irregular to issue an execution, upon a judgment, or decree, which is prima facie discharged by a bankrupt certificate, so as to be no longer in existence as a subsisting debt against the defendant, or his property; without a previous application to the court, and upon due notice to the discharged bankrupt.

And where the creditor of a bankrupt, who has been discharged subsequently to the decree, issues an execution against his property without having taken any steps to test the validity of such discharge, the court of chancery will grant relief, by setting the execution aside, upon motion.

The appropriate remedy of a complainant, in the court of chancery, where he wishes to contest the validity of a defendant's discharge under the bankrupt act, and to obtain satisfaction of the decree out of the defendant's subsequently acquired property, is to file a supplemental bill; stating the obtaining of the decree, the alleged or pretended discharge of the defendant, and the fraud which renders it invalid; and praying that the decree may be carried into full effect against the defendant, and his property, notwithstanding his alleged discharge.

And if the complainant wishes to protect and preserve his lien upon the defendant's subsequently acquired real estate, as against those who may become bona fide purchasers thereof without notice of the alleged invalidity of the defendant's discharge, he should file a notice, in the county clerk's office, of the pendency of such supplemental suit.

It seems that in a proper case, the court may allow the complainant to proceed by petition; for leave to take out an execution, upon his decree, notwithstanding the discharge of the defendant under the bankrupt act. But the defendant must be served with a copy of such petition, and with notice of the time and place of presenting the same.

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THIS was an appeal from an order of the vice chancellor of the eighth circuit. The bill in this cause was filed to foreclose a mortgage; and the proceeds of the sale of the mortgaged premises being insufficient to pay the debt and costs, the complainants obtained the usual decree, for the payment of the deficiency, against Avery and Patterson, two of the defendants, who were personally liable for the debt secured by the mortgage. Subsequently to the entry and docketing this decree for the deficiency, Avery applied for and obtained a discharge under the bankrupt act of 1841; which discharge was granted in 1843. In November, 1845, the complainants, without any previous application to the court for leave to take out an execution against Avery or his property, caused a writ of *fiery facias* to be issued against the real and personal estate of both of those defendants, generally; including the real estate of which they were seised, when the decree was docketed, in January, 1840, or at any time thereafter. Under that execution the sheriff levied upon the personal property of the defendant Avery, which he had acquired subsequent to his discharge. Avery thereupon applied to have the execution set aside as to him, and for a perpetual stay of proceedings against him upon the decree; or for such other relief as he was entitled to under these circumstances. In opposition to this application, the complainants produced affidavits, tending to show that the discharge of Avery was procured by a fraudulent concealment of his property. The vice chancellor, instead of setting aside the execution as to Avery, directed a reference, to a master to take proof of the facts and circumstances stated in the affidavits on the part of the complainants, and to report such proofs to the court; and he reserved the decision of the questions, involved in the application, until the coming in of the master's report. From this order the defendant Avery appealed.

*A. Taber*, for the appellant.

*H. R. Selden*, for the respondents.

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THE CHANCELLOR. The regularity of the proceedings of Avery, to obtain his discharge under the bankrupt law, are not called in question in this case. It would therefore be a matter of course to set aside the execution, as to the property acquired by him subsequent to the decree in bankruptcy, were it not for the alleged fraud in those proceedings. The fourth section of the bankrupt act of 1841, makes the discharge, or certificate, when duly granted, a full and complete discharge of all debts which are provable under that act, unless it is impeached for some fraud or wilful concealment of his property or rights of property, contrary to the provisions of the act; and on prior reasonable notice, *specifying in writing* such fraud or concealment. Where a suit is commenced against the bankrupt subsequent to his discharge, it is his duty to set up his discharge as a defence; so as to give the adverse party an opportunity to impeach it for fraud, if he wishes to do so. He must also set up the discharge, in a suit which is pending against him at the time it is obtained, as a bar to the further continuance of that suit to obtain satisfaction of the debt of him personally, or out of his future acquisitions; provided the situation of the suit is such as to enable him to set up such a defence in that suit. (*Valkenburgh v. Dederick*, 1 *John. Cas.* 133. *Cross v. Hobson*, 2 *Caines' Rep.* 102. *Desobry v. Morange*, 18 *John. Rep.* 336.) In cases of that kind the court will not relieve the bankrupt, upon motion, where he has lost the benefit of his discharge by his own neglect. But where a judgment, or decree, obtained subsequent to the discharge, would be binding on the defendant or his property, although he has had no opportunity to plead his discharge, the court will give him relief upon a summary application. (*Lister v. Mundell*, 1 *Bos. & Pul.* 427. *Baker v. The Judges of Ulster*, 4 *John. Rep.* 191.) But in such a case, if the validity of the discharge is disputed, the relief granted is to put the bankrupt in the way of trying its validity, without, in the meantime, interfering with the rights which the creditor has acquired by his judgment, or decree, that has been regularly obtained. (*Baker v. Taylor*, 1 *Cowen's Rep.* 165.)

There is still another class of cases, in which the court may

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be called upon to interfere upon motion ; where the discharge is subsequent to the judgment, or decree, but where the creditor, notwithstanding such discharge, proceeds to issue his execution without permission of the court, and without having taken any proceedings on his part to test the validity of the defendant's discharge. In cases of that description, the better opinion appears to be that it is irregular to issue an execution, upon the judgment, or decree, which *prima facie* is no longer in existence as a subsisting debt, against the defendant or his property, without a previous application to the court, and upon due notice to the discharged bankrupt. In the case of *Russell and Hall v. Packard*, (7 *Wend. Rep.* 431,) where the defendant had been discharged from his debts, under the insolvent act, after the recovery of the judgment, but was subsequently arrested upon an execution, issued against him on such judgment, the supreme court ordered him to be discharged ; although the plaintiff attempted to impeach both the regularity of the defendant's proceedings and the validity of the discharge itself. Mr. Justice Sutherland there said, "the court will not, upon a motion of this kind, try the validity of a discharge, upon affidavits." So in the case of *Billings v. Skutt*, (1 *John. Cas.* 105,) where the debtor, previous to his discharge, had given a bond and warrant, upon which the creditor entered up a judgment subsequent to such discharge, the court set aside the judgment ; saying that, if the plaintiff meant to contest the validity of the discharge he ought to have brought a suit upon the bond, in the ordinary course. And in the recent case of *Boyd v. Vanderkemp and others*, (*ante*, p. 273,) where one of the defendants, after the final decree obtained his discharge under the bankrupt act, and the complainant afterwards took out an execution against the defendant's subsequently acquired property, this court set it aside as irregular. (*See also* 9 *John. Rep.* 259.) I am aware that in the case of *Hunt v. Brooks*, (18 *John. Rep.* 5,) the supreme court refused to set aside an execution, issued subsequent to the defendant's discharge, upon a judgment recovered previous to that time ; and compelled the defendant to resort to an *audita querela*. But that was the case of a discharge under



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the act of April, 1811, which the supreme court of the United States had declared to be unconstitutional as to debts contracted before the passing of that act. The court refused to set aside the execution upon that ground alone; but permitted the defendant to bring the *audita querela*, to enable him to carry the question to the court of dernier resort, upon a writ of error, for its decision.

Where the defendant has obtained a discharge, subsequently to the judgment or decree against him, which discharge is upon its face a discharge of his person and his subsequently acquired property from liability, upon such judgment or decree, it would be very inconvenient, and would frequently produce great injustice, to permit the plaintiff to deprive him of the possession and control of his property, by seizing it upon an execution, and leaving it in the custody of the sheriff until the question can be decided whether he has or has not been guilty of a fraud in obtaining his discharge. Again; the bankrupt law requires that the defendant shall have prior notice in writing, specifying the particular fraud charged against him in obtaining his discharge. This he cannot have if the execution is issued against him in the first instance, and the charges of fraud are made, for the first time, in affidavits read in opposition to his motion to set aside the execution and to have his property restored to him. In the supreme court, the plaintiff has a very convenient and appropriate remedy to test the validity of the discharge; by bringing a suit upon the judgment, in which suit the bankrupt will be compelled to plead his discharge or lose the benefit of it. And this will give the plaintiff an opportunity in his replication to such plea to specify the fraud upon which he relies. Or if the plaintiff wishes to preserve his lien upon the lands which belonged to the defendant at the time of docketing the judgment, or which he has subsequently acquired, his remedy is by a *scire facias*. And if the defendant in the judgment, upon being personally served with that writ, neglects to appear and set up his discharge as a bar to the execution against him or his subsequently acquired property, the judgment upon that proceeding will be conclusive against him, as to the right

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of the plaintiff to have execution upon his original judgment notwithstanding the alleged discharge.

The appropriate remedy of the complainant, in this court, where he wishes to contest the validity of the defendant's discharge, subsequent to the decree, and to obtain satisfaction of the decree out of subsequently acquired property, is to file a supplemental bill; stating the obtaining of the decree, the alleged or pretended discharge of the defendant, under the bankrupt act, subsequent to such decree, and the fraud of the defendant which renders the alleged discharge invalid; and praying that the decree may be carried into full effect against the defendant, and his property, notwithstanding his pretended discharge. And if the complainant wishes to protect and preserve his lien upon the defendant's subsequently acquired real estate, against those who might become bona fide purchasers thereof without notice of the alleged invalidity of the defendant's discharge, he may file a notice of the pending of this supplemental suit, in the county clerk's office, as required by the statute.

Perhaps, in a proper case, this court might allow the complainant to proceed by petition, for leave to take out execution upon the decree; setting out in such petition the fraud which renders the alleged discharge invalid, and giving due notice to the defendant of the time and place of presenting such petition, and serving a copy thereof upon him. For upon such a petition, if the alleged fraud was denied, the court could award an issue to try the question of fraud. Or it might order a reference to a master to inquire and report whether the defendant had been guilty of the fraud stated in the petition of the complainant; and might grant or deny the application, for an execution upon the decree, according to the result of such trial or reference.

The order appealed from in this case must be reversed, and the execution must be set aside as to the appellant; but without prejudice to the right of the complainants to contest the validity of the alleged discharge, of such appellant, as they may hereafter be advised. They are also to be at liberty to file a supplemental bill, before the vice chancellor, to carry the original decree into

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effect, notwithstanding the discharge; or to apply to the vice chancellor, by petition, for leave to take out an execution, against the appellant, upon such decree. This being a new question here, and the affidavits on the part of the complainants making out a strong *prima facie* case of fraud, no costs are allowed to the appellant, either upon this appeal or upon the motion to the vice chancellor. Nor is the appellant to be permitted to bring any suit against the complainants, or their solicitor, or the sheriff, for any thing done under the execution; without the special leave of the vice chancellor. But if the complainants do not eventually succeed in showing the discharge to be fraudulent, the vice chancellor is to direct compensation to be made, to the appellant, for any actual damage which he has sustained by the seizure of his property under the execution; to be ascertained in such manner as the vice chancellor may think proper to direct.

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THE NEW-YORK LIFE INSURANCE AND TRUST COMPANY *vs.*  
MILNOR and others.

It is a matter of course, on making a decree of foreclosure and for the sale of the mortgaged premises, upon a mere suggestion that separate portions of such premises are held, or claimed, by different persons, under conveyances or mortgages which are subsequent to the mortgage to the complainant, to insert provisions in the decree which will enable the master to sell in such a manner as to protect the equitable rights of the defendants respectively.

Under the usual provision inserted in decrees in such cases, if the grantee of a portion of the premises is, by virtue of his conveyance, entitled to a right of way, or other easement, in the residue of the premises which belonged to his grantor subsequent to such conveyance, it will be a matter of course for the master to sell such residue subject to the right of way, &c. in favor of the owner, or purchaser, of the dominant tenement, and of the heirs and assigns of such owner or purchaser.

Where it is suggested, at the time when the decree of foreclosure and sale is applied for, that the mortgaged premises are held by the several defendants in parcels, the proper direction, to be inserted in the decree, is that if it shall appear to the master who makes the sale that separate parcels of the mortgaged premises have been con-

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veyed, or encumbered by the mortgagee, or by those claiming under him subsequently to the lien of the complainant's mortgage, such master shall sell the mortgaged premises in parcels, in the inverse order of their alienation; and according to the equitable rights of the parties as such subsequent grantees or incumbrancers, as such rights shall be made to appear to the master.

If a man conveys to another a piece of land surrounded by other lands of the grantor, the grantee, and those claiming under him, have a right of way of necessity through such other lands of the grantor; as incident to the grant. And the same principle applies where the piece of land conveyed is surrounded in part by the lands of the grantor, and in part by lands of a third person.

A right of way of necessity, over the lands of the grantor, in favor of the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way; but continues only so long as the necessity exists.

And if the grantee of the dominant tenement, or those claiming the same under him, afterwards, acquires by purchase or otherwise, a convenient way over his own lands, to the tenement in favor of which the way of necessity previously existed, the way of necessity over the lands of the original grantor of such tenement will cease.

So, if a convenient way to such tenement is subsequently obtained, by the owner thereof, from the opening of a public highway to, or through, such tenement.

*Aliter*, where the owner of land has a right of way to the same, over the premises of another, either by prescription or by express grant.

A way of necessity only arises upon the implication of a grant, and cannot be extended beyond what the existing necessity of the case requires. It is only commensurate with the existence of the necessity upon which the implied grant is founded; and when such necessity ceases, the right of way also is terminated.

THIS was an application on the part of S. Grant, one of the defendants in this cause, for a rehearing, or for a modification of the decree of sale of the mortgaged premises, or for a review and correction of the decision of the master charged with the sale, as to the order in which the several parcels of the mortgaged premises should be sold under the decree. The premises were one hundred and twelve and a half acres of land in the county of Genesee, lying in the form of a parallelogram, bounded upon the west by a public highway; and were mortgaged to the complainants in 1833, by J. Milnor, the then owner thereof, to secure the payment of \$1000 and interest. Milnor conveyed the whole premises to S. Harmon, who subsequently conveyed the same to N. McComber, one of the defendants in this cause. In February, 1837, McComber conveyed the whole premises to J. Ranney, subject to the payment of the complainant's mortgage; and

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in March thereafter, Ranney gave back to McComber, a mortgage, upon the same premises, for \$300; upon which mortgage a small balance remained due at the time of this application. In November, 1833, Ranney conveyed twenty acres of the mortgaged premises, lying upon the south side thereof, and extending from the highway to the rear of the lot, to the defendant J. Conger, with warranty, *subject to the payment of \$400, of the mortgage of the complainants, and the interest on that sum from the first of December thereafter.* And in January, 1841, Conger conveyed the undivided half of this twenty acres, together with other lands, to N. Tuller, with warranty; and at the same time he took back a mortgage upon the premises thus conveyed, to secure the payment of \$2000; which mortgage was subsequently assigned by Conger to J. H. Martindale.

In July, 1839, Ranney conveyed ten acres, in the southeast corner of the remaining ninety-two and a half acres of the mortgaged premises, to H. J. Pearce, with warranty. Those ten acres were subsequently conveyed, by Pearce, to the defendant R. Sprague, who conveyed the same to Martindale after the commencement of this suit. This part of the mortgaged premises was not adjacent to any road; and the owner thereof claimed a right of way of necessity, by virtue of the deed from Ranney to Pearce, over the residue of the mortgaged premises which belonged to Ranney at the date of that conveyance. On the 23d of October, 1841, Ranney conveyed such residue of the mortgaged premises, being eighty-two and a half acres, to N. Tuller and C. Conger, with warranty; subject to the mortgage to the complainants. At the same time he took back from them, a mortgage upon the same eighty-two and a half acres of the mortgaged premises, to secure the payment of \$1875 of the purchase money, with interest thereon from the first of May thereafter; which mortgage was subsequently assigned to the defendant Grant, as collateral security for a debt due to him from Ranney, the mortgagee. Tuller died insolvent; and his infant heirs were made parties to the bill of foreclosure, together with the other persons who had interests in, or liens upon, any part of the mortgaged premises at the time of the commencement of the suit.

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No defence being made to the suit, a decree was made for the foreclosure and sale of the mortgaged premises, or of so much thereof as might be necessary to pay the debt and costs of the complainants, and the costs of the guardian ad litem of the infant defendants. The decree also directed that the master who should make such sale should, on a day to be appointed by him before such sale, and of which the parties who had appeared in the cause were to have notice, receive proofs of the order and manner of the alienation of the mortgaged premises, and should sell the same in parcels, in the inverse order of alienation, except where the conveyance by which the parcels, or any of them, had been alienated, should express that the same was made subject to the payment of the mortgage to the complainants, or of portions thereof, which parcels should be first sold by the master, in the inverse order of alienation; and that each parcel sold, should be sold subject to the legal and equitable right of passage across the same of the *grantors* of the remaining parcels of the said premises, and their assigns.

Under this decree, the master was attended by the defendants who had appeared, in the cause, and received proofs of the order and manner of alienation of the mortgaged premises. But the defendant Grant, who had suffered the bill to be taken as confessed against him for want of an appearance, was not summoned, and did not attend to produce proof of his rights; and no evidence was introduced before the master, as to the existence of the mortgage of the 23d of October, 1841, from Tuller & Conger to Ranney, or of the assignment of such mortgage to Grant. The master therefore decided that the several parcels of the mortgaged premises should be sold in the following order. *First*; the eighty-two and a half acres sold by Ranney to Conger & Tuller; *Secondly*, Conger's undivided half of the twenty acres conveyed to him in November, 1833; *Thirdly*, the other undivided half of the same twenty acres; and *Fourthly*, the ten acres conveyed to Pearce, in June, 1839.

*J. Rhoades*, for defendant Grant. The decree is erroneous in requiring the master to sell the 82½ acres, in the first instance, to

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pay the complainants' mortgage ; for the reason that the 20 acres which was conveyed in November, 1838, was conveyed subject to the payment of \$400 of the complainants' mortgage, with interest from the 1st December, 1838.

The decree is also erroneous in giving to the person who shall become the purchaser of any portion of the premises a right of passage over and across the premises ; for the reason that no such right of way is shown either in the pleadings or the conveyances ; and also because the right of way is not defined by metes, courses and distances, or located in any particular part of the premises.

Martindale having become a party interested, with a full knowledge of all the facts at the time he purchased the 10 acres of his client Sprague, and at the time he contracted for the purchase of the decree, is chargeable with the costs of this application ; if the court shall be satisfied that the errors complained of were procured at his suggestion, and for the purpose of obtaining an undue advantage. And such costs ought to be charged on the proceeds of the 10 acres, or on him personally.

*O. Clark*, for Martindale, Sprague, and Conger. The decree is correct in relation to the right of way. It does not create or decree a right of way ; but simply protects any legal or equitable right of passage which Martindale already possesses. And is it wrong to protect such rights ? Clearly, no further proceedings are necessary in the cause, to ascertain the respective rights of the parties in this respect. If Martindale does not now possess a right of way which ought to be protected, the decree does not secure one to him. But if the above is not a sufficient answer, and the fact of the existence of a right of way should arise, then the papers disclose that Martindale is entitled to such right. (*See 3 Kent's Com.* 420, 4th ed.)

The decree requires no amendment in respect to the order of sale. It provides for the sale in the inverse order of alienation, and that the parties who have last agreed to pay the complainants' mortgage, shall have their portions of the mortgaged premises first sold.

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The report and determination of the master, as to the order of sale, were right, because he decided on the evidence produced to him. Had the mortgage of Grant been proved, we concede that one undivided half of the 20 acres retained by Conger should be first sold, to satisfy the whole of the complainants' claim; but not the other undivided half of said 20 acres covered by Martindale's mortgage. For Conger gave Tuller a warranty deed of that undivided half of the 20 acres, and in consideration of that, received back the mortgage which was assigned to Martindale, and which he now owns. This mortgage is prior in date to the mortgage which Grant holds. After that Conger and Tuller purchased the remainder of the mortgaged premises, subject to the payment of the whole of complainants' mortgage. Suppose the complainants' mortgage had then been foreclosed. Could Conger and Tuller insist that the undivided half of the 20 acres covered by Martindale's mortgage, and for which Conger had given a warranty deed, should be first sold? Manifestly not. How, then, can Grant, as against the holder of that mortgage, claim what neither Mr. Conger nor Tuller, the mortgagors, could claim?

This is a matter addressed to the discretion of the chancellor. Grant has slept on his rights. Had the master reported the evidence to the court his determination would have been approved; because it is sustained by the evidence produced. The equity of the application does not require any interference in favor of Grant.

Here is a decree fairly made. Grant has not been vigilant enough (although put on his guard) to take care of his rights; and there are no merits in his favor to render it proper to open the decree. But should the court think otherwise, Grant should be required to pay the costs of the decree, and of resisting this motion, to Martindale as the solicitor of Sprague, as well as to the solicitor of the complainant.

**THE CHANCELLOR.** In the absence of any proof of the existence of the mortgage upon the eighty-two and a half acres, to secure a part of the purchase money of that portion of the prem-



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ises covered by the mortgage of the complainants, the master did not err in deciding that the eighty-two and a half acres should be sold first, to satisfy the amount reported due to the complainants, and the interest and costs. And under the special directions contained in this decree, as to the mode of selling, it is somewhat doubtful whether the master would have been authorized to decide differently, even if the defendant Grant had appeared before him and proved the giving of that mortgage to Ranney, and the assignment thereof to himself. Upon the facts now disclosed, however, the petitioner is entitled to relief, upon payment of the costs to which the defendants Sprague and Cramer have been subjected in opposing this application. And if the particular directions contained in this decree prevent the proper adjustment of the rights of the parties, in settling the order of sale, the decree itself must be amended by striking out the particular directions, and inserting the directions usually contained in decrees in such cases.

Under the act of 1840, to reduce the expenses of foreclosing mortgages, and the rules of this court regulating the proceedings in foreclosure suits, defendants who have distinct interests in different portions of the mortgaged premises, but who have no defence to the complainant's claim as set forth in his bill, have no opportunity, previous to the decree, to litigate the question, between themselves, as to the order in which the several parcels of the mortgaged premises should be sold; so as to protect the equitable rights or interests of such defendants in their respective portions of the premises. It is, therefore, a matter of course, at the time of making a decree of foreclosure and sale, to satisfy the complainant's debt and costs, upon a mere suggestion that separate portions of the mortgaged premises are held by different persons, under conveyances or mortgages subsequent to the mortgage of the complainant, to insert a provision in the decree which will enable the master to sell in such a manner as to protect the equitable rights of the defendants respectively. The provision usually inserted in the decree in such cases is, that if it shall appear to the master, who is to make the sale, that separate parcels of the mortgaged premises have been conveyed or incum-

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bered, by the mortgagor, or by those claiming under him subsequent to the lien of the complainant's mortgage, such master shall sell the mortgaged premises in parcels, in the inverse order of alienation, *according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to the master.* This qualification of the direction to sell in the inverse order of alienation, that it shall be according to the equitable rights of the subsequent grantees or incumbrancers, is necessary to meet a case like the present. And it should always be inserted in the decree when such decree directs the sale of the premises in parcels, in the inverse order of alienation. Under a decree thus drawn, if the grantee of a portion of the premises was, by virtue of his conveyance, entitled to a right of way, or other easement, in the residue of the premises which belonged to the grantor subsequent to such conveyance, it would be a matter of course for the master to sell such residue subject to such right of way, or other easement, in favor of the owner or purchaser of the dominant tenement, and his heirs and assigns.

It was settled in the case of *Clark v. Rugge*, (2 Roll. Abr. 60,) which appears to be the same case reported by Croke under a somewhat different title, that if a man, having a close surrounded by his own land, grants such close to another, the grantee and those claiming under him have a right of way of necessity, through the lands of the grantor, as incident to the grant; which way of necessity the grantor may assign to the grantee through such part of his land as he shall think proper. The same principle also appears to apply to the case where the close granted is partly surrounded by lands of a third person. At least, such appears to have been the opinion of Mr. Justice Popham in *Jordan v. Atwood*, (Owen's Rep. 122.) The implied grant of a way of necessity over the lands of the grantor, appears to be as strong in the one case as in the other; for the grantee cannot claim a right of way over the adjoining lands of such third person. The case of *Howton v. Frearson*, (8 Term Rep. 50,) also appears to be a decision in favor of the principle that there is an implied right of way over the adjoining lands of the grantor, where the grantee has no other means of obtaining access to the

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lands granted, without trespassing upon the property of a stranger. For, as I understand that case, the land conveyed by the plaintiff and others, to the defendant, was bounded on three sides by the land of persons other than the grantors. But as the grantee could not have access to his land, called the *upper meadow*, on the north, south or west sides thereof, without trespassing upon the property of strangers, he was entitled to a way of necessity, by virtue of his grant, over the adjacent land of the plaintiff, as one of the grantors; which land bounded the *upper meadow* on the east. That, too, was a very peculiar case, inasmuch as the grantors conveyed the close called the upper meadow, to the defendant, in their characters of trustees for the sale thereof, and the lands of the plaintiff which bounded it on the east, were held by him in his own right. And yet the court held that the defendant was entitled to a passage over those lands as a way of necessity; as he could not enjoy the lands granted to him unless he could have a right of way to it. The grantee of the ten acres now owned by Martindale was therefore, at the time of his grant, entitled to a way of necessity over the eighty-two and a half acres which still remained the property of the grantor after such grant, if the lands adjoining the ten acres on the east then belonged to a stranger, so that the grantee could not have obtained access to the lands thus granted, either from the south or east, without trespassing upon the property of others. And in selling the lands in parcels, in the inverse order of alienation, and according to the equitable rights of the parties interested, they should be sold in such a manner as to preserve that right of way, if it still exists, for the benefit of the present owner of the ten acres; or for the benefit of the purchaser of that part of the mortgaged premises, if it shall be necessary to sell these ten acres under the decree.

The direction contained in the decree upon that subject, however, is erroneous, even if it does not, in fact, reserve the right of way in favor of the wrong party. For it prejudices the question of the original existence of the right of way claimed, without anything to show whether Pearce was or was not the owner of the lands adjoining the ten acre lot on the east, at the time of the con-

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veyance of that lot to him. It also provides that each parcel sold shall be sold subject to the legal and equitable right of passage over the same; without limiting the right to the owner of the dominant tenement, as such right existed between him and the owners of the servient tenement previous to the foreclosure and sale under the decree. In other words, a sale in conformity to the directions of the decree, if this direction in such decree is not so carelessly drawn as to mean nothing, would create new rights of way, as between the purchasers of the different parcels of the mortgaged premises, which did not exist between the owners of such parcels previous to the sale. Again; the right of way of necessity over the lands of the grantor, in a conveyance, in favor of the grantee, and those subsequently claiming the dominant tenement under him, is not a perpetual right of way; but it continues only so long as the necessity exists. And if the grantee of the dominant tenement, or those claiming the same under him, should afterwards, by purchase or otherwise, acquire a convenient way over his own lands to the tenement in favor of which the way of necessity previously existed, the way of necessity over the lands of the original grantor of such tenement will cease. So, if a convenient way to such tenement is subsequently obtained by the owner thereof by the opening of a public highway to, or through such tenement. The case is otherwise where the owner of land has a right of way to the same, over the premises of another, by prescription or by express grant. A way of necessity only arises upon the implication of a grant, and cannot be extended beyond what the existing necessity of the case requires. Such a right of way is only commensurate with the existence of the necessity upon which the implied grant is founded, and when such necessity ceases the right of way also is terminated. (*See Holmes v. Goring*, 2 Bing. Rep. 76.) The special direction inserted in the decree in this case, in relation to the sale of the several parcels of the mortgaged premises, subject to a *right of passage* over the same, must therefore be expunged, as having been inserted in such decree by inadvertence. The direction inserted in the decree, in relation to the order of selling the premises, must also be stricken out; except

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that part thereof which directed the master to appoint a day for the parties, who had appeared in the cause, to appear before him, and that he should receive proofs of the order and manner of alienation of the premises. And in lieu of the special directions thus expunged, or stricken out of the decree, the usual directions in such cases must be inserted in the decree; to wit: "that if it shall appear to the master who is to make such sale, that separate parcels of the mortgaged premises have been conveyed, or encumbered, by the mortgagor, or those claiming under him subsequent to the lien of the complainants' mortgage, such master shall sell the premises in parcels in the inverse order of alienation, according to the equitable rights of the parties, as such subsequent grantors or incumbrancers, as such rights shall be made to appear to the said master."

The provision in relation to the notice to the parties, who have appeared in the cause, to attend the master and exhibit their proofs as to the order of alienation, I have left in this decree, because that part of the decree has already been executed by the master; and a part of this application is to reverse his decision upon the evidence adduced. And for the same reason the decree must be amended *nunc pro tunc*, as of the time when it was originally entered: and if the decree has been enrolled the enrolment must be discharged, and the decree enrolled anew as amended. A more proper provision, however, to be inserted in a decree of this kind, as to the hearing of the parties in relation to the order of selling the different parcels, would be to direct the master, in his notice of sale, to specify the time and place when the several parties interested in different portions of the mortgaged premises, as subsequent purchasers or incumbrancers, should attend before him and be heard as to the order in which the several parcels should be sold. This would give all parties interested an opportunity to be heard upon that question; without the unnecessary expense of employing a solicitor to enter an appearance for them previous to the decree, to entitle them to notice of the time and place when and where the order of selling is to be settled by the master.

It remains to be seen what special directions are necessary to

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be given to the master in this case, by a separate order to be now entered, as to the manner of selling the premises, so as to protect the rights of the parties as they now appear. Although it does not certainly appear that Pearce, the original grantee of the ten acre lot, ever was entitled to a right of way of necessity over the eighty-two and a half acres, or, if the right once existed, that it still continues in favor of the present owner of the ten acre lot, still it does not seem to be necessary to go before the master, to take any proof on the subject, before the sale. For the owners of these two parcels of the mortgaged premises will now be able to understand their respective rights so as to explain them to the bidders at the sale. It will therefore be sufficient to direct the master to put up and sell the eighty-two and a half acres, subject to such a way of necessity over the same, if any, as shall, immediately previous to such sale, exist in favor of the then owner or owners of the ten acre lot; under the original conveyance thereof to Pearce, and the subsequent grants of the same. And if it shall be necessary to sell the ten acre lot, under the decree, there must be reserved to the purchaser of that lot at the master's sale, the same right of way, if any, which shall have existed at the time of the sale of the eighty-two and a half acres, in favor of the then owner of the ten acre lot. These special directions are necessary and they must be inserted in the master's deed, in order to preserve the supposed right of way, if it in fact exists. For as the owner of the ten acre lot is a party to the decree, an absolute sale of the eighty-two and a half acres, without reserving the right of way as it existed previous to such sale, would give the purchaser a perfect title to the premises, purchased by him, discharged of any such right.

As the twenty acres conveyed to Conger, in 1838, was conveyed subject to the payment of \$400, of the complainant's mortgage, and the interest on that amount, the owner of the ten acres has the right to insist that the proceeds of the twenty acres, to the extent of the \$400 and interest, or so much of such interest, as has not already been paid by Conger upon the mortgage to the complainants, as well as the whole proceeds of the eighty two and a half acres, shall be applied in payment of the decree in

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this cause, before resort shall be had to the ten acre lot. And as Ranney, at the time of the conveyance of the eighty-two and a half acre lot to Conger and Tuller, was, as the owner of that lot, entitled to have the \$400 and interest charged upon the twenty acres, in part payment of the mortgage to the complainants, and in discharge of so much of the lien upon his remaining interest in the premises, he did not lose that right by the conveyance to Conger and Tuller. For the taking back of the mortgage from them at the same time, for a portion of the unpaid purchase money, preserved the right, to the extent of the moneys secured by and still due upon that mortgage. And the defendant Grant, as the assignee of the mortgage, is entitled to the same rights as between him and the present owners of both moieties of the twenty acres.

The master must therefore inquire and ascertain how much of the \$400 and interest which was charged upon the twenty acres by the deed of November, 1838, has been paid by the owners of the twenty acres, towards that \$400 and interest; and how much thereof still remains unpaid. And if any thing was paid upon the mortgage to the complainants, either for principal or interest, by Conger and Tuller, or by Conger alone, after they became the purchasers of the eighty-two and a half acres, without specifying whether it was paid upon account of the \$400 chargeable on the twenty acres, or on account of the \$600 chargeable on the eighty-two and a half acres, the master must allow four tenths of it as a payment on account of the \$400 and interest charged on the twenty acres. After the master has thus ascertained how much there is still chargeable primarily upon the twenty acres, he must add thereto four tenths of the costs decreed to be paid. If that amount, with interest thereon to the time appointed for the sale, is paid to him previous to the sale, he must apply it in part payment of the debt and costs due to the complainants. And in that case he is not to sell any part of the twenty acres, unless the proceeds of the other two parcels of the mortgage shall be insufficient to pay the residue of the amount due upon the decree, and the small balance still due upon the mortgage to the defendant McComber. This last mentioned mortgage is a lien upon the whole of the mortgaged premises.

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But as all the conveyances from Ranney contained covenants of warranty against it, the balance still due thereon is primarily chargeable upon the proceeds of the eighty-two and a half acres, after paying the amount due upon the decree with interest and costs; and should be deducted from the amount due upon the mortgage of Conger and Tuller to Ranney.

If the amount chargeable primarily upon the twenty acres is not paid before the sale, the master must sell that twenty acres first, and apply the proceeds, or so much thereof as may be necessary, to the payment of the amount primarily chargeable upon the twenty acres, and the four tenths of the costs. He must also sell the eighty-two and a half acres, subject to the supposed right of way as above directed, and apply the proceeds thereof or so much as may be necessary, to pay the remainder of the debt and costs decreed to be paid. And the residue of such proceeds, or so much as may be necessary, will then be applicable to the payment of what shall hereafter be ascertained to be due upon the mortgage to McComber. If the proceeds of the eighty-two and a half acres are not sufficient to pay the balance due upon the decree, the master must then sell the ten acre lot and apply the proceeds thereof or so much as may be necessary to satisfy the deficiency. And if that is not sufficient, he must then sell the twenty acre lot, if it has not already been sold.

In relation to the mode of selling the twenty acres, it is not necessary that the two undivided moieties thereof, which belong to Conger and to the heirs of Tuller, should be sold separately, in order to protect the rights of the several parties having interests therein. A sale of the whole together will save the expense of a subsequent partition; and the proceeds of the sale of the whole together can be subsequently apportioned and applied according to the equitable rights of the parties now interested in that portion of the mortgaged premises. Conger conveyed the undivided half of the twenty acres to Tuller with warranty. If Tuller therefore had paid for that half, his heirs would have a right to claim that the whole of the \$400 and interest, which was a charge upon that twenty acres, should be paid out of the proceeds of the undivided half thereof which remained the prop



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erty of Conger. And their half of the twenty acres should not be sold unless the proceeds of Conger's half are insufficient to pay off and discharge so much of the complainants' debt and costs, and of the balance due on the mortgage to McComber, as is properly chargeable upon the twenty acres. It appears, however, that Tuller gave back a mortgage upon the half of the twenty acres conveyed to him, to secure the purchase money; and that this half of the twenty acres is now the only security for the payment of the amount remaining due upon that mortgage. If Conger had not assigned the mortgage, he would therefore be entitled to have an amount, of the proceeds of Tuller's half of the twenty acres, equal to what is still due upon his mortgage, applied to satisfy the proportion of the decree in this cause which is equitably chargeable upon the twenty acres. But as Conger has assigned his mortgage to Martindale, as between Conger and the assignee of that mortgage, equity requires that the whole amount justly chargeable upon the twenty acres should be paid out of the proceeds of Conger's half of the twenty acres, if such proceeds are sufficient for that purpose; so as to enable the assignee of the mortgage to obtain satisfaction thereof, if possible, out of the proceeds of the other half of the twenty acres.

There are many other parties to this suit who are not before the court on this application, and who may have equitable claims upon the surplus moneys, which may arise upon the sale of different portions of the mortgaged premises, after satisfying the amount which is payable under the decree. All that can be done now, therefore, is to direct the order of sale of the different parcels which it may be necessary to sell to pay the amount which is due upon the decree, with interest and costs. The residue of the proceeds of the several parcels sold, must be brought into court; so that the rights of the several persons interested therein may be settled, upon a reference to a master, under the provisions of the 136th rule. And the master who makes the sale must be directed to state, in his report of the sale, the amount which each separate parcel of the mortgaged premises sold by him under the decree brought at such sale.

An order must be entered directing the decree to be amended

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*nunc pro tunc*, as above directed, and containing the necessary instructions to the master to make the sale conformably to the principles herein stated, and to make his report accordingly. The master must assign a time and place for the parties to attend before him, for the ascertainment of the amount which is primarily chargeable upon the twenty acres belonging to Conger and the heirs of Tuller, on account of the \$400 and interest specified in the deed of November, 1838; and he must direct notice to be given to the solicitor of Grant, as well as to the solicitor of Conger and Sprague. Grant must also pay to the solicitor of the two last named defendants their costs upon this application, as fixed by the rule of this court.

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## CAGGER vs. HOWARD.

The 139th rule, relative to the appointment of the same person as receiver in different creditor's suits, only extends to the case of two or more bills filed by different persons against the same judgment debtor; and does not, in terms, apply to cases where the first suit is against two defendants, one of whom is not a party to the second suit.

The object of the 139th rule was to save the expense of different receiverships, and to prevent a conflict of claims, between receivers, as to the property assigned to them respectively by the defendants in the different suits. The principle of the rule should therefore be adhered to, even where the same person is made a defendant alone in one suit, and is joined with others as defendant in another suit; when the defendants in the respective suits have no conflicting claims; and where the receiver in one suit is willing to act as receiver in the other, and to give such additional security as is required by the court.

In cases coming within the rule, a receiver who has consented to accept the trust in one suit may be compelled to accept and execute the trust in a second suit; provided both suits are commenced before the chancellor, or before the same vice chancellor; so as to give the court jurisdiction over such receiver. And if the receiver refuses to give security in the second suit, he may be removed from his trust as receiver in the first; and the court may appoint another person receiver in both suits.

The assignment to the receiver, executed by the defendant in a creditor's suit, need not contain a reservation of property which he holds merely in the character of trustee for others, upon a valid trust, and in which property he has no beneficial

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interest. Nor is it necessary that the assignment should except property which the defendant has already assigned to a receiver appointed in a previous suit.

But such an assignment should contain an exception of such property as is by law exempted from sale on execution; where it is made to appear to the master that the defendant is entitled to have any part of his property thus exempted; and this, notwithstanding the general language of the order of reference.

THIS was an application, by the defendant in a creditor's suit, for an order that the master review his decision as to the person to be appointed the receiver in this cause, and also that he review his decision as to the form of the assignment which the defendant was required to execute, under the decree. The suit was commenced in July, 1845, against L. Howard, the only defendant therein; and the usual decree was obtained, including a direction for the appointment of a receiver, &c. according to the provisions of the 191st rule. Upon the execution of the order of reference, it appeared that a former creditor's bill had been filed before the vice chancellor of the first circuit, in 1843, by T. W. Birdsall and others, against the present defendant and J. Walsh; that soon after the commencement of that suit, W. J. Schenck was appointed a receiver therein, and gave security for the performance of his trust, in the sum of \$500. The defendant in the present suit, therefore, insisted before the master, that Schenck must be appointed as the receiver in this suit also; and that it was improper to appoint any other person. The complainant however produced proof that Schenck absolutely refused to consent to act as receiver in this suit. The master thereupon appointed D. Hinds such receiver, and required him to give security in the sum of \$3000 for the faithful execution of his trust. The master settled the form of an assignment to be executed by the defendant; which the latter objected to, upon the ground that it did not contain an exception of the property which he had assigned to the receiver in the former suit; or of property held by the defendant in trust; or of property which was not liable to execution. The master overruled these objections, and settled an assignment which purported to transfer to the receiver all the estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests,

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property and effects whatsoever of the defendant, or belonging to or due to him, or in which he had any estate, right, title or interest, at the time of the commencement of the complainant's suit; subject to the present and future order, direction and control of the court of chancery in relation thereto.

*N. Hill Jun.*, for the complainant.

*J. Edwards*, for the defendant.

THE CHANCELLOR. The master was right, in this case, in refusing to appoint Schenck the receiver, although he had been duly appointed in the suit commenced against this defendant and Walsh about two years before. The 139th rule did not in terms apply; as the language of the rule only extends to the case of two or more bills, filed by different persons, against the same judgment debtor or judgment debtors. The object of the rule, however, was to save the expense of different receiverships, and to prevent a conflict of claims between them as to the property assigned to them respectively, by the defendant, in the different suits. The principle of the rule should therefore be adhered to, even where the same person is made a defendant alone as the judgment debtor in one suit, and is joined with others as defendants in another suit; where the defendants in the respective suits have no conflicting claims with each other in relation to the property which is directed to be assigned and delivered to the receiver; provided the receiver in one suit is willing to act as the receiver in the other, and to give such additional security as is required by the court. In cases coming within the terms of the rule, a receiver who has consented to accept the trust in one suit has no right to decline it in another. And where the suits are all commenced before the chancellor, or before the same vice chancellor, so as to give the same judge of the court jurisdiction over such receiver, he may be compelled to accept and execute the trust, in a second suit. Or if he will not give the additional security, which may be required of him in such second suit, the court may remove him from his receivership in the first suit, and appoint another

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person receiver, in both suits, who is able and willing to give the additional security required.

Here the first suit was commenced before the vice chancellor of the first circuit, who alone has the power to remove such receiver in case he should neglect to accept the trust and to give the additional security required in the present suit. The evidence before the master who appointed the receiver in 1843, must have showed that a bond in the penalty of \$500 was sufficient to cover all the property which the judgment debtors then had. But in this suit, the master has decided that the receiver must give security in the sum of \$3000. It is evident, therefore, that the greatest portion, if not all, of the property which the defendant had at the time of the filing of the present bill, was property acquired by him since the former suit was commenced. Or that the former receiver has been guilty of a neglect of his duty; or that there had been collusion between the purchaser of the complainant's demand in the former suit and the defendant, to keep the property out of the hands of other creditors. For Schenck, the receiver in the former suit, swears, that although he consented to be appointed receiver in that suit, he never acted as the receiver, and was never called on to act as such; and that he did not know the defendant Howard. Even the defendant himself testified before the master that he did not know that he ever executed an assignment of his property. The receiver also appears to be ignorant of the fact that an assignment was executed; though, from the testimony of Robinson, it appears that an assignment must at some time have been made, so that it came into the hands of the complainants' solicitor in that suit. So much of this application, therefore, as seeks to reverse the decision of the master appointing Hinds the receiver, in this cause, must be denied with costs.

This disposes of the original application, which was directed to stand over for the purpose of enabling the defendant to procure affidavits, &c. He now shows that he was a householder and had a family in this state, before the commencement of this suit, and at the time of the decree in this cause. There was no necessity that the assignment, to be executed by the defendant,

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should contain an express reservation of property which he held merely in the character of trustee for others, upon a valid and subsisting trust, and in which property the defendant had no beneficial interest. For the assignment, upon its face, shows that it is made under an order of the court directing the appointment of a receiver of the money, property, things in action, and effects of the defendant merely. Nothing will pass, therefore, under the general words of that assignment, except property, or things in action, in which the defendant had some beneficial interest at the time of the commencement of the suit. Nor was it necessary to except property which the defendant had already assigned to the receiver appointed in the suit commenced in 1843. However broad the terms of the assignment may be, it is impossible that it should transfer to the receiver property in which the defendant had no interest, whatever, at the time of the execution of such assignment. But in this case, if the defendant had any interest in property which he had assigned to the receiver in the former case, it was proper that the defendant should assign it to the receiver in this suit; so that the latter would have the right to claim so much thereof as might not eventually be found to belong to the complainants in such former suit, and might call upon the former receiver to account for the same. Again, the defendant does not distinctly state that he now has any property, or things in action, in which he had a beneficial interest at the time of the commencement of the former suit in 1843.

The defendant's objection that the assignment, as settled by the master, should have contained an exception of property which was *not liable to execution*, was much too broad; as that exception would have embraced all equitable interests, as well as all choses in action, of the defendant. I presume the defendant only intended, however, to claim an exception of such articles as were by law exempted from sale on execution, by reason of the party against whom the execution is issued being a housekeeper or having a family for which he provides. To that extent, the defendant in a creditor's bill is to be permitted to retain his property. And the assignment to the receiver should

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contain an exception, by some appropriate words, which will prevent the legal title to such exempt property from passing to the receiver by such assignment; where it is made to appear to the master that the defendant is entitled to such exemption. Even if the order for the appointment of the receiver, and directing the defendant to assign and deliver over his property, is expressed in general terms, and contains no exception of exempt property, the master, upon ascertaining the fact that the defendant is entitled to the benefit of the statutory exemption, should insert the proper exception in the assignment; notwithstanding this general language of the order of reference. (*See Fitzhugh v. Everingham*, 6 *Paige's Rep.* 29.)

It does not distinctly appear, in this case, whether the debt upon which the judgment that forms the foundation of this suit was recovered, was contracted before or after the act of 1842, increasing the amount of exempt property; though, from the examination of the defendant, it is probable that a part of the debt was contracted as early as 1837. In any event, however, the defendant, as a householder, was entitled to the exemption allowed by the twenty-second section of the article of the revised statutes relative to executions against property. (2 *R. S.* 367.) The assignment, as settled by the master, must, therefore, be modified by inserting therein the following exception immediately before the commencement of the *habendum* clause: "Except such articles of property as were, at the time of making the above recited order, legally exempt from levy and sale under any execution which might have been issued on the judgment, against the said party of the first part, mentioned and set forth in the bill of complaint filed in the cause aforesaid, in the court of chancery; upon the ground that the said party of the first part was, at the time of making such order, a householder, or had a family for which he provided." Such an exception will protect all the rights of the defendant, whether the debt for which the complainant's judgment was recovered was contracted before or after the passage of the act of 1842, enlarging the amount of property which is exempt from sale upon execution.

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And it will, at the same time, secure to the complainant all his legal and constitutional rights to obtain satisfaction of his debt out of the property of the defendant.

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## MARKHAM vs. MARKHAM.

Where an answer on oath is waived, and affidavits of disinterested witnesses in support of an injunction are annexed to, and filed and served with the bill, the affidavits in support of the answer, and upon which the defendant relies in his application to dissolve the injunction, must either be served upon the complainant's solicitor with the answer, or must be served on him the usual length of time before the making of the motion to dissolve the injunction.

UPON a motion to dissolve an injunction, on bill, answer and affidavits, where an answer on oath was waived, and the charges in the bill were supported by the affidavits of disinterested witnesses, as authorized by the 37th rule ;

*A. Taber*, for the defendant, offered to read affidavits, in support of the answer, which affidavits had not been served upon the adverse party with the answer, or otherwise.

*H. M. Collier*, for the complainant, objected that these affidavits could not be read on the motion.

THE CHANCELLOR said, that to entitle the defendant to read affidavits in support of his answer, in such a case, he must either file them with his answer, and serve copies thereof upon the solicitor of the adverse party with such answer, or he must serve them with his notice of motion to dissolve the injunction, and must give notice to the complainant's solicitor, that they will be read upon the hearing of such motion.



## VAN AERNAM vs. VAN AERNAM.

The complainant, in a suit for a divorce, who asks for a decree declaring the children of the defendant illegitimate, must produce some further evidence of his non-access than the mere fact that his wife was living in adultery with another person.

The maxim, *pater est quem nuptiæ demonstrant* is founded upon very strong reasons of policy as well as of law. And courts should not unsettle the title to property, nor put the *status* of any one in jeopardy, by speculating upon the mere probabilities in favor of the illegitimacy of a child who may, or may not, have been begotten by the husband of its mother.

The ancient rule of the common law, that the husband must be presumed to be the father, if he was within the realm during any part of the period of gestation, has long since been repudiated by the courts.

It is not necessary, in order to bastardize the issue, that the evidence should be such as to render it impossible that sexual intercourse should have taken place between the husband and wife. It is sufficient if it proves beyond a reasonable doubt, that no such intercourse did take place, during the usual period of gestation, previous to the birth of the child.

The court of chancery, upon dissolving the marriage contract for the adultery of the wife, is not authorized to declare one of her children illegitimate, who must have been begotten before the commission of the adultery charged in the complainant's bill.

Where the wife of the complainant was for several years living in the same place with him, as the concubine or kept mistress of another person, the husband in the meantime making no exertions to break up the adulterous intercourse; *Held* that, in the absence of evidence of non-access, the complainant must be presumed to be the father of the children begotten upon his wife during that time; and that he was not entitled to a decree declaring such children to be illegitimate.

THE bill in this case was filed by the husband to obtain a divorce from his wife, upon the ground of her adultery. It appeared from the bill that the defendant had two children; who, as the complainant charged, were illegitimate. And from the proofs it appeared that she had another child born a short time after the filing of the complainant's bill. The master to whom it was referred to take proofs of the facts and circumstances stated in the bill, reported that the defendant had been guilty of the adultery charged; and that all three of the children were illegitimate.

*H. Fuller*, for the complainant.

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THE CHANCELLOR. The adultery is sufficiently established, in this case, to entitle the complainant to a divorce. But the master erred in supposing that the testimony before him was sufficient to authorize the court to declare all the children illegitimate. The statute declares that when the husband is complainant, the legitimacy of children born or *begotten* before the commission of the offence charged, shall not be affected by the decree. And even as to children begotten after that time, and before the commencement of the suit for the divorce, their legitimacy shall be presumed until the contrary is shown. (2 R. S. 145, § 42.) The first offence of adultery charged in the complainant's bill, in this case, is stated therein as having occurred sometime in the year 1841, but without stating at what particular time of the year. It cannot, however, be presumed to have occurred so as to have broken off sexual intercourse between the complainant and the defendant until the time when he says he first learned the fact, in July or August of that year. If the eldest child, therefore, was born within the usual period of gestation from the first of July, 1841, it must have been begotten before the time of the commission of the first offence charged in the bill. At least such is the legal presumption, in the absence of any evidence of a premature birth. The time of the birth of such first child, however, is not stated either in the bill or in the proofs, so as to enable the court to form an opinion whether it was, or was not begotten before the commission of the first offence charged in the bill. It is true, one of the witnesses, who was examined in December last, stated that the defendant had lived and cohabited with her paramour for the last five years, and that her eldest child was born more than one year after she commenced living with him. That, however, would extend the adulterous intercourse back into 1840, and would not show that the child was begotten after the commission of the first offence charged in this bill. The time of the birth of that child should at least have been ascertained, to enable the court to see whether it was probably begotten after the first offence charged. For if it was begotten before that time, the court has no jurisdiction to declare it illegitimate; even if the fact of the non-access of the husband was fully established. (2 R. S. 145, § 44.)

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Again; the mere fact that the wife of the complainant was living in the same place with him as the mistress or concubine of another man, for several years, the husband in the meantime making no exertions to break up such adulterous intercourse, and taking no steps to obtain a divorce, is not sufficient evidence from which the non-access of the husband can be legally presumed; so as to entitle him to a decree bastardizing the children of his wife. The bill states the residence of the complainant to be in Schenectady, where the defendant and her paramour are proved to have also openly cohabited together. And the husband, in substance, admits that he was acquainted with their adulterous intercourse more than four years previous to the filing of his bill. Some farther evidence, therefore, should have been produced by him to prove his non-access in the meantime. In a case in the year books, (1 *Hen.* 6, 3, 7,) Justice Rolf says, "Although the wife leaves her husband and lives with an adulterer, her son is legitimate and shall inherit, unless his adversary can show some special matter." In other words, the party insisting upon the illegitimacy of the son born in wedlock, must give some farther evidence of the non-access of the husband, than the mere fact that the wife was living in adultery with another. The legal maxim, *pater est quem nuptiæ demonstrant*, is founded upon very strong reasons of policy, as well as of law. And courts should not be permitted to unsettle the title to property, or to put the *status* of any one in jeopardy, by speculating upon the mere probabilities in favor of the illegitimacy of a child, who might or might not have been begotten by the husband of its mother. In the strong language of Lord President Blair, in *Routledge v. Carruthers*, (*Nicol. Adult. Bast.* 161,) "this legal maxim, that he is the father whom the nuptials show to be so, is the foundation of every man's birth and status. It is a plain and sensible maxim, which is the corner stone, the very foundation on which rests the whole fabric of human society; and if you allow it once to be shaken, there is no saying what consequences may follow." The ancient rule of the common law was, that the husband must be presumed to be the father, if he was within the realm, during any part of the time, within the ex-

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treme limits of the period allowed for gestation. 'This rule has long since been repudiated by the courts, as not consistent either with reason or common sense. For, other evidence of the non-access of the husband, is frequently as strong and satisfactory to show the actual impossibility that the husband could have been the father of the child. Nor is it necessary that the evidence should be such as to render it impossible that sexual intercourse should have taken place between the husband and wife. It is sufficient if it proves, beyond a reasonable doubt, that no such intercourse did take place. But though I utterly reject the ancient strictness of the rule on this subject, and with it the coarse elucidation of the rule adopted by Judge Rickhill, in *Flettsam and Julian*, ( *Year Book*, 7 *Hen. 4th*, 9, 13,) which the great dramatist afterwards puts in the mouth of King John,(a) I cannot consent to relax the settled rule of the law on this subject beyond what was done by this court in the case of *Cross v. Cross*, (3 *Paige's Rep.* 139.)

The usual decree for a divorce must be entered in this case, but without bastardizing the children; unless the complainant prefers to have the case referred back to the master, to enable the latter to receive evidence of the actual non-access of the husband; or proof that he was residing at such a distance from her at the time these children must have been begotten, or such of them as were not begotten previous to the adultery charged in the bill, as fully to rebut the presumption that they are his children. If he prefers to have a further inquiry on that subject, the matter will be referred back to the master to review his report, and to take further testimony; and the entry of the decree in the meantime will in that case be suspended.

- (a) *K. John*. "Sirrah, your brother is legitimate;  
 Your father's wife did after wedlock bear him:  
 And, if she did play false, the fault was her's:  
 Which fault lies on the hazards of all husbands  
 That marry wives. Tell me, how if my brother,  
 Who, as you say, took pains to get this son,  
 Had of your father claimed this son for his?  
 In sooth, good friend, your father might have kept  
 This calf, bred from his cow, from all the world."

(*King John*, act 1, scene 1.)

**JARVIS vs. PALMER.**

A decree or order entered by consent of both parties, before a vice chancellor, cannot be appealed from, although both parties consent that either may appeal.

THIS was an appeal from an order purporting to have been made by the vice chancellor of the first circuit, but which was made by the consent of the counsel for both parties. The consent to the order also contained an express stipulation, that such consent was to be without prejudice to the right of either party to appeal from such order.

*R. F. Winslow*, for the appellant.

*Charles Edwards*, for the respondent.

THE CHANCELLOR. The court is only authorized to hear appeals from decisions actually made by vice chancellors. The parties cannot, by consent, have a decree, or order, entered, with liberty to appeal from the same. The appellate court cannot, in this way, be compelled to take original jurisdiction and decide questions pending before a vice chancellor.

The appeal being unauthorized must be dismissed, but being by consent it must be without costs to either party. .

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**HOES and others vs. VAN HOESEN.**

[Affirmed, How. Cas. 271; 1 N. Y. 120.]

Where a reversionary interest in personal property is not disposed of by the will of a testator, it does not necessarily belong to those who may happen to be his next of kin at the termination of the particular estate or interest in such property which is bequeathed by him. But, as an interest in property undisposed of by the will, it belongs to the widow and next of kin of the decedent, who were entitled to distributive shares in such unbequeathed interest at the death of the testator.

And if any of the parties entitled to such distributive shares die without disposing of

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their interests therein, their shares will go to their personal representatives, as a part of the personal estate of such decedents.

An interest in the personal estate of the testator, given by his will to a legatee who is in esse, although it is not to vest in possession until after the death of another person, vests in interest in the legatee immediately upon the death of the testator; and is capable of being released by such legatee at any time.

It is a general rule that where there is a particular recital in a release, and nothing appears on the face of the instrument to show that any thing beyond the matter of such recital was intended to be discharged, general words of release following such recital will be qualified by it; so as not to discharge other claims which were not in the contemplation of the parties.

But the construction of a release must depend upon the language of the instrument itself; and extrinsic evidence cannot be resorted to, for the purpose of showing the intention of the party executing such release.

The personal estate of a testator is the primary fund for the payment of debts; notwithstanding the will contains an express dedication of a portion of the real estate for the payment of debts or legacies, and the testator has disposed of all his personal estate specifically.

It is a general rule also, that the personal estate is the primary fund for the payment of legacies, although such legacies are charged upon real estate; whether such real estate be devised, with a direction to the legatee to pay the legacies, or is charged with such legacies, or is given to trustees for that purpose.

But in reference to legacies, an absolute and specific disposition of all the personal estate of the testator, and not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the realty in exoneration of the personalty.

Where the personal estate is not, in terms, exonerated from the payment of debts or legacies, and where the debts and legacies are not declared to be chargeable upon the real estate exclusively, an interest in personal property not disposed of by the will is not exonerated; but is the primary fund for the payment of legacies as well as debts.

Even where the personal estate is in terms exonerated, for the benefit of a particular legatee, and not for the benefit of the estate generally, the failure of the particular bequest destroys the exoneration, *pro tanto*.

THIS was an appeal, by the defendant, from a decree of the late vice chancellor of the third circuit. Matthew Van Hoesen died in 1817, seised of a farm in Columbia county worth nine or ten thousand dollars, and possessed of personal property, exclusive of farming utensils, furniture, and stock on the farm, of the value of about \$5000. He left a widow, and three sons, John, the defendant in this suit, George and Lambert, and three daughters, Maria, now the wife of C. C. Hoes, and Ann, the wife of A. Hager, the complainants in this suit, and Jane; his

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only children and heirs at law. By his will, made on the day of his death, he disposed of his property as follows: "I give, devise and bequeath unto my two sons, John and George, all my farm of land, with all thereunto belonging, with my house, barn, &c. to them, their heirs and assigns forever, share and share alike; with all my farming utensils, and also all my stock, of whatever nature, now on my farm. I give, devise, and bequeath unto my son Lambert \$3000, to be paid in one year after my decease, by my two sons John and George. I give, devise, and bequeath unto my three daughters, *Dorothe*, Ann, and Jane, each the sum of \$700; also to be paid by my two sons John and George, as they severally become of age. *Item*; It is my will that my beloved wife *Dorothe* shall have the use and income of *all my estate* as long as she remains my widow." And he appointed his wife executrix, and his brother and his son John, the defendant in this suit, his executors; the two last of whom proved the will and took out letters testamentary thereon. The brother of the testator died in 1822, leaving the defendant the sole executor. The debts and funeral expenses, amounting to about \$200, were paid by the executors. And the widow survived until June, 1834, when she died, without having again married; leaving the six children of the testator surviving her. At the time of the death of the testator, his son George was but sixteen years of age, and had no property or means of paying his share of the legacies given to his brother and sisters, except the property devised and bequeathed to him by his father, subject to the estate of his mother therein during her life or widowhood. And the defendant, although he was then of age, was worth less than \$200, exclusive of his interest in the property of his father which was given to him by the will. The executors, therefore, with the assent of the widow, paid the pecuniary legacies, as they became due, out of the moneys due to the testator, and the proceeds of the other personal property. And being advised by the late Judge Vanderpoel, and other lawyers, who were friends of the family, that the will, as drawn, did not correctly and clearly express the intentions of the testator, but was so drawn that difficulties might

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thereafter arise, the defendant, upon paying the amount of such legacies out of the personal property, took from the legatees respectively, releases to such executors, under seal, releasing them from all claims of such legatees, for or on account of the real or personal estate of the testator. Maria, one of the daughters of the testator, and who by mistake was called Dorothe in the will, was of full age two or three years before the death of the testator; and she was unmarried at the time she received her legacy in 1818, out of the proceeds of such personal estate. And she therefore executed a release, drawn from a form which Judge Vanderpoel had prepared for the defendant to be executed by the legatees respectively. By that release, after reciting the giving of the legacy to her by the will of the testator, and that the \$700 and interest thereon had been paid to her by his two sons, John and George, she did, for and in consideration of the premises, and the further sum of one dollar, release and discharge them from the payment of the said legacy or any part thereof; and did release them, and the executors and executrix named in the will of her father, of and from all claims which she had, or might have, of, in or to any part of his estate, either real or personal; thereby declaring that she had received her full share and proportion thereof.

The defendant made an arrangement with his mother, by which he carried on the farm under her, and had the control and possession of the farming utensils, stock, &c. during her life, and provided for her support; and the minor children of the testator lived with, and were supported by her, during their minorities. And when his brother George became of age, the defendant purchased all his interest in his father's estate. After his sister Ann was married, the defendant also paid to her husband her legacy with interest. And he subsequently took from her said husband, a release under seal, dated in March, 1833. By that release, the latter, in consideration of \$700, theretofore paid to him by the defendant, as one of the executors or the will of M. Van Hoesen, did release and discharge the defendant, as such executor, of and from all claims, legacies, rents and demands which he then had, or ever had in right of his wife, the



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daughter of the deceased testator, by virtue of the will of her father; and also of and from all claims and demands, which the releaser then had, or which he ever had in right of his wife, of, in, and to the personal property of which the testator died possessed; and thereby acknowledged that the payment of the \$700 to him was taken and received in full for all of his wife's share of, in, and to the estate of her deceased father.

About five years after the death of the widow, Maria and Anne, two of the daughters, with their husbands, filed their bill in this cause against the defendant as the surviving executor, claiming two sixths of the residuary personal estate of the testator, with interest thereon from the death of the widow; as an interest in the personal estate, not disposed of by will. The bill alleged, among other things, that the legacy of Mrs. Hoes was paid to her and her husband, after her marriage, and that when it was paid, and the acquittance therefor executed, the defendant had possession of the will, and knew the contents and legal effect thereof, and also knew that she would be entitled to one sixth of the personal estate after the death of the widow; but that they had never seen the will at that time, and the defendant was aware that they were ignorant of it. And the complainants insisted that if the acquittance purported to discharge anything but the legacy of \$700, it was false and fraudulent. The same charge, in substance, was contained in the bill, in relation to the legacy of Mrs. Hager, and to the release given for the same by her husband. The defendant, in answer to these charges in the bill, stated that the will was opened and read in the presence and hearing of all the family of the testator, a few weeks after his death, and was proved and recorded in March of the next year; that it was the declared will of the testator, previous to, and at the time of making his will, to give his real estate to his sons John and George, and his money at interest to his son Lambert and the daughters; that the scrivener, who drew the will, had instructions from the testator to draw it so as to give the farm and farming utensils, and the stock on the farm, to the widow for life, and after her death to the defendant and his brother George, and to direct the legacies to the other children to be paid out of

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his other personal property, which consisted principally of money at interest; and that it was owing entirely to the ignorance and mistake of the scrivener, and the weak state of the testator, that it was not drawn and made according to such instructions; that at the time such releases were executed, the defendant had no doubt, or reason to doubt, but on the contrary verily believed, that the legatees and Hager, the husband of Anne, were agreed as to what was the intention of the testator, and that they were all willing to carry that intention into effect; and that they executed such releases for that purpose, freely and with a full knowledge of their contents. He also denied that he committed any fraud, or used any art, stratagem, or device, for the purpose of procuring the releases, or either of them, but stated on the contrary, that the widow, out of respect to the intention of the testator, and to promote harmony in the family, relinquished her claim to the income of the personal estate, and consented that the amount then out upon interest should be applied to pay off the legacies; and that his sister Maria, who was then twenty-four years of age and unmarried, agreed to receive the \$700 legacy, and to execute to the defendant and to his brother George and the executors, a full and absolute release of all claims upon the real and personal estate of the testator; that the defendant thereupon paid her the legacy and interest, by giving his note to her for the amount, which was subsequently paid by him, and she executed her release accordingly, at the time of receiving such note; and that A. Hager, after his intermarriage with her sister Anne, also agreed to receive the amount of the \$700 legacy to his wife, and to execute a full and absolute release of all claims upon the real and personal estate of the testator; and that the defendant thereupon paid the \$700 and interest to him, and he thereafter executed the release accordingly. The answer further stated, that such releases were freely executed, with a full knowledge, on the part of the parties executing them, of their contents; and with a full knowledge, or the means of obtaining information, of all their rights, and without any fraud or misrepresentation, on the part of the defendant. The defendant thereupon insisted upon such re-

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leases as a full and complete bar to the claim of the complainants. And he also submitted to the court, whether, upon the true construction of the will, the personal estate, other than the stock and farming utensils, belonged to the children of the testator as distributees, under the circumstances stated in the answer.

No proofs were taken by either party, but the cause was brought to a hearing upon the pleadings. The vice chancellor decided and decreed that the complainants were entitled to have and receive from the defendant, two sixths of the value of the personal property of the testator exclusive of the farming utensils and stock upon the farm, with interest thereon from the death of the widow; after payment of the debts and funeral expenses of the testator. And he directed a reference to a master, to take and state an account of the personal estate, upon that principle.

*A. L. Jordan*, for appellant. I. The legacies were not expressly charged by the will upon the real estate. It created at most a charge upon the real estate by implication; or upon John and George, the devisees, in respect to the real estate. The personal fund was therefore primarily liable and must be applied in exoneration of the real estate. 1st. Because the will did not in terms charge the legacies to be paid out of the real estate, to the exclusion of the personal property. 2d. Because there was no plain intent to that effect to be gathered from the will. 3d. It is improbable that the testator intended to charge the estate in remainder in the farm devised to the defendant and his younger son with \$5100 legacies, in exoneration of the personal estate. The whole property thus devised to them, or nearly the whole, would have been swept away. In *Ancaster v. Mayer*, (1 *Brown's C. C.* 460,) the chancellor says, "The question that next arises is, whether a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the payment of the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject: on the contrary, I have always un-

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derstood, that in order to exempt the personal estate, the testator must express an intention to do so; although no particular form of words was necessary. I therefore take the rule *imprimis* to be, that neither the charge of the debts upon the real estate, nor the gift of the personal, is sufficient of itself to exempt it." And again in the same case, the chancellor, after suggesting that it might have been better had the rule been adopted requiring express words in the will, for the purpose of exempting the personal estate, says, "therefore if there be a declaration plain, or manifestation clear, so that it is apparent upon the face of the will that there is such a plain intention, to exempt the personal estate, the rule then is not to disappoint, but to carry such intent into execution. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is by law the first fund for the payment of debts." (See also *Tait v. Lord Northwick*, 4 Vesey, 816; *Livingston v. Newkirk*, 3 John. Ch. Rep. 319; *Watson v. Buckwood*, 9 Ves. 448; *Kelsey v. Deyo*, 3 Cowen, 133; *Tole v. Hardy*, 6 Id. 333.)

II. The whole of the personal estate, not specifically devised, having been exhausted in the payment of the legacies, John and George contributed the residue, and paid them off—or which amounts to the same thing, they procured from the widow a consent that the personal fund should be applied to the payment of the debts, and it was applied accordingly. No balance of personal property, therefore, remains in the hands of the defendant, as executor, to be distributed. It is all fully accounted for by the payment of the legacies.

III. The income of the whole real and personal estate belonging to the widow during her life, the defendant is not responsible in this suit for any thing which may have come to his hands from either of those sources. If he is accountable for any thing, it is to the administrator or personal representative of the widow alone.

IV. The releases executed by the complainants to the defendant, extinguished all claims upon the estate, real and personal, in the hands of the defendant, as executor or otherwise. The

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releases are broad, and cover the whole ground of claim upon the estate, in any shape. All fraud in procuring the releases is expressly denied, in terms. And the facts set forth in the answer in response to this bill shew that there was no fraud. There was no misrepresentation or artifice used: no suppression of facts or information. The plaintiff had knowledge of the contents of the will, or full and ample means of information, equally with the defendant. The defendant was under no obligation to inform them of what they knew, or, with ordinary diligence, might know as well as himself. The facts set forth in the answer in response to the bill, shew that the plaintiffs have been paid more than they were entitled to by the will. The latter clause of the will giving the whole use and income of the whole estate to the widow for life, so qualified and restricted the former clause as to make the legacies not payable until after the widow's death. No legacy can be deemed to be payable until by the terms of the will, funds come into the hands of the executors or persons charged with the payment, sufficient for the payment thereof. The legatees were not therefore, at the time of the payment of the legacies, *ex æquo et bono* entitled to any more than the amount thereof, with a rebate of interest for the life of the widow, upon annuity principles. The facts set forth in the answer in response to the bill, show that the sons, John and George, upon the construction contended for by the plaintiffs, would have been stripped of the testator's bounty, and most probably brought in debt; because their estate in remainder in the farm, stock and utensils, would not at that time have been actually worth enough to pay the legacies.

Upon the whole, so far from the complainants having cause of complaint, in regard to the execution of these releases, either upon the ground of fraud or hardship, they acted with their eyes open; with full knowledge, or the most ample and ready means of knowledge. The most obvious justice and equity required of them all they have done. They have been very fairly and liberally dealt with, and there is gross injustice in the present attempt to evade their own deliberate acts. They have reaped the full benefit of those acts by a prompt payment of their lega-

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cies, without any litigation or delay; while it is evident that great embarrassments might have been in the way of their recovering any portion of those legacies during the lifetime of the widow, had the defendant placed himself upon his legal rights. Besides, the personal property which under all the provisions of the will taken together, was the proper fund for the payment of the legacies, has, by the consent of the widow, and the relinquishment of her right to the income thereof for life, been devoted to the payment of those legacies.

The vice chancellor, in his opinion, seems to have entirely overlooked this latter point; although that point was made and fully discussed before him, and the authorities cited. And the vice chancellor's views are erroneous in regard to the point upon which alone he appears to have decided the case. The answer is a plain conscientious disclosure of all that could make against the defendant. All fraud is denied, and there is, upon the whole view of the case, as made by the bill and answer, a most evident moral propriety and justice in the arrangement made between the parties which produced the releases in question. It is hardly to be credited, and the complainants could not have believed, that the testator ever intended to charge the defendant and his younger brother with the payment of \$5000 in legacies, for which no provision to the amount of one cent was made by the testator, until after the death of his widow. Without the application of the personal property, the remainder in the real estate, as before suggested, would have been scarcely sufficient to pay the legacies, and probably would not have sold for enough. It is fairly to be inferred that this view of the subject presented itself to the complainants, and was acted upon by them when the releases were executed. It was this view, undoubtedly, coupled with the opinion that the personal estate was primarily liable, which induced the counsel, referred to in the defendant's answer, to give him the advice they did in relation to procuring the releases.

*A. Vanderpoel*, for respondent. I. John and George Van Hoesen are, in respect to the estate devised to them by the will

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of their father, chargeable with the payment of the legacies to Lambert and the daughters. And the personal property not bequeathed to John and George was exonerated from the payment of the same.

It is a rule both of law and equity, that where the will does not show an intention to exonerate the personal estate, legacies are payable first out of the personalty. But it is equally well established, that where the intention of the testator to exonerate the personal property is evident it must be exonerated. And it is the duty of the court to collect from the whole will, whether the testator did, or did not, intend to exonerate his personal property. (*Kelsey v. Deyo*, 3 Cowen's Rep. 133. *Harris v. Fly and others*, 7 Paige's Rep. 421. *Burton v. Knowlton*, 3 Ves. 106, 107. *Tole v. Hardy*, 6 Cowen, 333.) The mere act of charging real estate with a legacy is not sufficient of itself to exempt the personal property. But a charge of the real estate, accompanied by such a disposition of the personal property that it cannot be applied to the payment of the legacies without doing violence to the intention of the testator, has, in all the cases cited by me, been held sufficient to exempt the personal property. All the authorities now agree, that it is the duty of the court to collect from the whole will an intention to exonerate the personal estate. And that express words to exempt it are not necessary. I have looked into the English, as well as all the American cases that have fallen within the range of my research, and am constrained to say that I have found this question no where more ably argued than it was by Messrs. Sudam and Ruggles in *Kelsey v. Deyo*, (3 Cowen, 133.)

It is said that the widow, too, is entitled to the use and income of the whole of the real estate for life, and that therefore the real estate cannot be deemed to be charged, and the personal discharged from the payment of legacies. To this I answer, 1. That in this case the charge was not only upon the real estate, but a personal charge upon the devisees John and George Van Hoesen, in respect to the estate devised to them. It was optional in them to accept, or to reject, the devise. If they accepted it, as they did in this case, they took it *cum onere*. They

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accepted it upon the condition of paying the legacies; a duty imposed upon them in respect to the estate devised to them. Where, then, is the hardship upon the defendants; when it was optional with them to accept or repudiate the devise to them?

2. In no aspect of the case was any hardship imposed upon the devisees. If they resolved to pay the legacies, they had a farm worth \$10,000, and personal property worth \$1000, subject to the life interest of their mother therein. The legacies amounted to \$5100. The estate devised to them was worth more than double that amount. But for the mother's life interest, and sub-

ject to that interest, the shares to John and George were each worth vastly more than the \$700 given to each of the daughters. 3. I am not prepared to admit that equality or inequality, reasonableness or unreasonableness in the disposition of a testator's property forms any just or legal criterion by which to judge of his intention. But if it were so, I should deny that in assuming the personal property in this case to be discharged from the legacies, John and George would receive such an inadequate share of the testator's bounty as to justify the belief that the testator intended, in effect, to give them the personal property also.

Again; the charge here was not only on the estate, but on the persons of the devisees, in respect to the estate devised to them. And if there had been no words of inheritance, the devisees would have taken a fee by implication. (*Jackson v. Ball*, 10 *John*. 155.) The court is familiar with the doctrine that where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only; but where the charge is on the person of the devisee in respect to the estate in his hands, he takes a fee by implication. (*Jackson v. Embler*, 14 *John*. 198.) 4. The analogy between this case and the case of *Kelsey v. Deyo*, (3 *Cowen*, 133,) is most striking. There the devisee was charged, even in a court of law, with the payment of the legacy; and the personal property was held to be discharged. The will there gave to N. Kelsey all the testator's real estate, and it gave legacies of £100 each, to three of the daughters, Mrs. Deyo, the wife of the plaintiff, being one of them; which legacies he directed his son Nathaniel to pay. To his



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wife, as in this case, he gave his personal property, for her natural life. The action there was assumpsit, against the testator's son Nathaniel, as devisee, charged with the payment of the legacy. It was then on all fours with this case. The distinguishing characteristic of the cases cited on the other side, is that in all of them the legacies were left, or ordered, to be paid by the executors or trustees. Here, as in the case of *Kelsey v. Deyo*, the legacies are ordered to be paid, not by the executors, but by the devisees, as such; only one of which devisees was an executor. In *Tole and wife v. Hardy*, (6 Cowen, 333,) it was decided that the personal estate was not exonerated from the payment of the legacy, by the terms of the will. For although the real estate was probably charged, yet the personal property was not so disposed of as to put it beyond the power of the executor to apply it to the payment of the legacy. That was the distinguishing feature between the two cases. And see Judge Woodworth's opinion, as to the inadmissibility of evidence to show an intent, on the part of the testator, different from the legal construction of the will. In *Watson v. Buckwood*, (9 Vesey, 456,) it was held that it was too late to say that it was not open to the court to collect from the whole will, an intention to exonerate the personal estate, though that intention was not expressed in any positive or conclusive words. In *Webb v. Jones*, (2 Br. Ch. Cas. 60,) it is said that the general rule is very clear that the personal estate is the fund first liable, and that the executors cannot exonerate it without first substituting another fund. But there is no magic in words. No peculiar form of expression is necessary in order to exonerate the personal estate. If the intention of the testator to exonerate the personal estate be evident, it must be exonerated. If the personal property was exempted from the payment of these legacies, then the complainants, upon the death of Mrs. Van Hoesen, had a clear and indisputable claim to a distributive share of the personal property.

II. The rights of the complainants are not barred by the releases which are set up in the answer. 1. They cannot, especially the release of Hager, be construed to cover the claim in question. They must be construed to relate only to the then

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present interests of the parties. 2. The parties had in contemplation only their legacies, when the releases were given; and the claims for which this suit is brought were not contemplated by the releasors. 3. The defendant suppressed, and forbore to communicate, knowledge of which he was possessed in respect to the rights of the complainants. It was a *suppressio veri*, which vitiated the release so far as it regarded this claim. 4. The release, in respect to this claim, was fraudulent and without consideration. No consideration having passed except the payment of the legacies, and the complainants when the releases were executed were ignorant of the rights which they are now prosecuting. 5. In these releases, especially the one given by Mrs. Hoes, there is a particular recital, showing the inducement or occasion that led to the releases, viz. the payment of the legacies. The general words afterwards inserted were controlled and limited by this recital. 6. It was not competent for the complainant, Hager, when his release was executed, to release the rights or claims for which this suit is brought. 7. Courts of equity will always look with jealousy at releases given by wards to guardians, by legatees or distributees to executors, and will not easily permit them to bar the real rights and interests of the parties.

In viewing this case the court will regard the relation of the parties, as well as their sex. The relation of guardian and ward, executor and legatee, trustee and cestui que trust, implies a solemn obligation on the part of the guardian, executor, or trustee, to deal with most scrupulous integrity with the other parties; to communicate to them all information that may affect their interest. And if there appears the slightest ground for suspicion of overreaching, no receipts, releases, or deeds, are ever regarded, in this court of conscience, as bars to the real rights of the parties. This court will always open the accounts of the parties, where an executor, trustee, or guardian, has taken releases without adequate consideration, or without the most perfect good faith. The extreme length to which courts have gone in disregarding releases to parties standing in this relation, shows the jealousy with which they are regarded.

The phraseology of the releases deserves consideration. 1. As

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to the release of Mrs. Hoes. By whom does this payment purport to have been made? By the executors, by the parties who it is said, were bound to apply the personal property to the payment of these legacies? No: but by John and George Van Hoesen, the devisees. It expressly recites that John and George have paid the legacy of \$700. This shows the sense of John under his then recent instructions received from Judge Vanderpoel. 2. As to the release given by Hager, as late as March, 1833. While this release does not exhibit the error of acknowledging payment from the devisees, it shows one equally fatal. It releases, and can only be construed to release a present interest. One which was then perfect. It releases the executor "from all claims and demands that I ever had, or now have, in right of my wife, of, in, and to the personal property of which M. V. H. died possessed." It releases, then, nothing more than the then present interest of the legatee; as we hope to show from authority. The defendant relies upon the general words, smuggled into these releases, at the suggestion of the defendant's friend and counsel, without communicating to the releasor the information which that counsel had given him. Generally, words in a release may be restrained by the particular occasion of giving it. (*Thorpe v. Thorpe*, 3 *Levinz*, 273. 1 *L. Ray*. 235, 236.) What was the occasion of giving this release? The payment of the \$700 legacy, and none other. Here is a case in point. A release of a legacy, and of all actions, suits and demands whatsoever. These general words which follow are tied up by the legacy, and release nothing else. (*Cole v. Knight*, 3 *Mod.* 277.) By referring to that case, the language will be found stronger than in either of these releases. The defendant acknowledged to have received £5, being a legacy, and then in general words he released the said Cole and wife, of the legacy, and of all actions, suits, and demands whatsoever, which he had or might have against the defendants, Cole and his wife, as executors of J.L., or which he might or could have, for any matter or thing whatsoever. The words are as strong there as in this case, yet the release was held not to have released a debt other than the legacy. Where there is a particular recital in a release, and the general

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words follow, the general words shall be qualified by the particular recital. Thus if a release acknowledge the receipt of £10, and thereof acquits and discharges the person of whom it is received, and also of all actions, debts, and demands; by the release, nothing is discharged but the £10. Such a release was held to discharge a judgment only, although it contained the general words, in full of all debts, demands, judgments, executions and accounts of whatever nature, in law or equity. (*Jackson, ex dem Roosevelt, v. Stackhouse, 1 Cowen, 126.*)

In *McIntire v. Clark*, (1 *Edw. Ch. Rep. 34*,) Vice Chancellor McCoun says, "It is a strong rule of equity that a release should be confined to what was under consideration at the time of giving it." And it was there held, that the general words in a release, of all claims and demands whatsoever, were to be restricted to the subject matter of the release. If a receipt be given for £10, in which there is a release of all actions, debts, and demands, nothing is released but the £10. (*Cole v. Knight, (3 Mod. 277.)*) It has also been held that a general release shall not bar what is future. (*Porter v. Philips, Croke Jac. 623.*) Although the release is general of all actions and demands, yet that doth not discharge what is future, and whereof he hath not any cause of action at the time the release was made. That principle is entirely fatal to the release of Hager. That purports to release nothing more than a present interest. Consider the occasion, the consideration only \$700, and then determine whether, according to the authorities, any thing but a present interest was released. There is a reason for construing this as releasing nothing but a present interest which did not exist in any of the cases cited. What did the husband Hager release? A chose in action? Hardly. If a chose, it was surely one which he could not reduce to possession. It is more than questionable whether the husband could release this interest of the wife at all;—an interest depending upon the death of the mother; and one which the husband could not receive. Suppose the husband Hager had died before the death of the widow, this right would surely have survived to his wife; because it was not reduced to possession in

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the lifetime of the husband. Suppose Hager had survived his wife, but had died before the death of old Mrs. Van Hoesen. It is by no means certain that the administrator of the husband would be entitled to the interest of the wife in this personal property. Where a release contains introductory matter explaining the facts, the release, though in general terms, must be controlled by the previous recital, and the court will give such an effect to it as may best consist with the manifest intention of the parties and the real justice of the case. (2 *Saund. Plead. & Ev.* 320. 5 *Barn. & Adol.* 609. 2 *Maule & Selw.* 423.) These remarks are made to show the impropriety of construing this as releasing any thing other than a present interest. So a release of all demands will not release a thing which, at the time of the release, is not demandable; or where a thing is to be done on a condition precedent, a release of all demands given before condition performed does not discharge it; for before that it does not lie in demand. (*Thorpe v. Thorpe*, 12 *Mod.* 460.)

Again; the releases in this case are void, because the defendant withheld material information from the legatees; and they did not know what they released. The first case to which I would call the attention of the court is *Salkeld v. Vernon*, (1 *Eden's Rep.* 64.) There the rule, which may be found in a variety of other cases, is thus stated by the Lord Keeper: "No rule is better established than that every deed obtained on *suggestio falsi*, or *suppressio veri*, is an imposition in a court of conscience. The release here was drawn by the attorney, plainly for the benefit of the releasee. The first question is whether the releases, or either of them, are bars to the account prayed? And that will depend upon the manner in which the releases were obtained. Now a release, *ex vi termini*, imports a knowledge in the releasor of what he releases, unless, upon a solemn composition for peace, persons expressly agree to release uncertain demands. Was the release in the present case the result of a composition for peace? No. Did the parties agree to release their rights, as heirs, or distributees, as uncertain demands? They were not even the subject of conversation. One party had them in his mind, and the other, the releasors, never

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thought of them. In *Jarvis and wife v. Drake*, (1 Vern. 19, the Lord Chancellor says, that it is a constant rule that where there is either the suppression of truth, or the suggestion of falsehood, the release shall be avoided. If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited. What was the particular matter recited here? The \$700 legacy and nothing else. *Gee v. Spencer*, (1 Ves. 32,) is a case where a release was set aside on account of the misapprehension of the party executing it. And that is a much weaker case than the present. There is also a note to that case which goes to show the facility with which courts of equity presume imposition, or ignorance, where a party has released an important right, or interest.

THE CHANCELLOR. If the vice chancellor was right in supposing that the releases were invalid, and that the legacies were not primarily chargeable upon the interest of the testator in that part of the personal estate which was not disposed of, by the will, after the termination of the widow's life estate therein, the decree is wrong as to the portions of the unbequeathed interest to which the complainants are entitled. Where a reversionary interest in personal property is not disposed of by the will of a testator, it does not necessarily belong to those who may happen to be his next of kin at the termination of the particular estate or interest in such property, which is bequeathed by him. But, as an interest in property undisposed of by the will, it belongs to the widow and next of kin of the decedent, who were entitled to the distributive shares in such unbequeathed interest at the death of the testator. And if any of them have died without having disposed of their interests therein, their shares go to their personal representatives, as a part of the personal estate of such decedents. Here, if there was an interest in the personal property undisposed of, one third of that interest belonged to the widow of the testator; and her executors or administrators alone can call upon the defendant for the payment thereof.

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Again; the widow being entitled to one third of the reversionary interest, if any there was, in the personalty not disposed of by the will, in addition to her life estate in the whole personal property beyond what was necessary to pay the debts and funeral expenses of the testator, she was, immediately upon his death, the absolute owner of the one third of the personal property; except that part thereof which was bequeathed to the two sons of the testator, after her death or remarriage. She might, therefore, with the assent of the executors, dispose of that third of the residuary property in any manner she pleased. And it appears by the answer of the defendant, that she did, long before her death, relinquish her interest in such residuary property; and consented that it might be applied by him to the payment of the legacies. And it was appropriated accordingly. This statement in the answer, is also responsive to that part of the bill which called upon the defendant to answer and discover what property the testator owned at the time of his death, and what disposition had been made of the same. And for the purposes of this suit, it must be taken to be true. The complainants, therefore, could not, in any view of this case, be entitled to more than two sixths of two thirds of the residuary estate; with interest thereon from the death of the widow. And if she died intestate, and they wish for an adjustment of the accounts between the defendant and her estate, they must take out letters of administration, and make their claims against him in the character of her personal representatives.

The release executed by Mrs. Hoes, before her marriage, appears on its face to be valid and effectual to extinguish all claim which she then had, or might thereafter have, against the executors, or against the defendant, for or on account of the personal estate of her deceased father. And her interest in the personal estate after the death of the widow, if she had any such interest, was absolutely vested in her immediately upon the death of her father; although it could not vest in possession during the life and widowhood of her mother. It was therefore an interest which she could release at any time; and was extinguished by the release of December, 1818, if that release was not obtained

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fraudulently or unfairly. It is unquestionably the general rule that if there is a particular recital in a release, and nothing appears on the face of the instrument to show that any thing beyond the matter of such recital was intended to be discharged, general words of release following such recital will be qualified by the recital; so as not to discharge other claims which were not in the contemplation of the parties. (*Knight v. Cole*, 1 *Show. Rep.* 150. *Ramsdell v. Hylton*, 2 *Ves. sen.* 310. *Lyman v. Clark*, 9 *Mass. Rep.* 235.) But the construction of the release must depend upon the language of the instrument itself; and extrinsic evidence cannot be resorted to for the purpose of showing the intention of the party by whom such release was executed. (*Butcher v. Butcher*, 1 *New Rep.* 113. *Van Brunt v. Van Brunt*, 3 *Edw. Ch. Rep.* 14.) In this case, the release, upon its face, does not appear to be limited to the claim for the legacy. On the contrary, the release contains a nominal consideration, in addition to the amount of the legacy; and for that consideration in addition to the payment of the legacy and interest, she declares that she has received her full share and proportion of the real and personal estate of her deceased father. And she not only releases the devisees, who are personally charged with the payment of the legacy, but also the executors and executrix, of and from all claims which she had, or might have, in or to any part of the estate. The answer, which is responsive to the bill in reference to the charge that the release was obtained by fraud and circumvention, also shows that it was in pursuance of a family arrangement. By such arrangement, the widow consented that the personal estate, in which she had a life interest, and in which property the reversion was not specifically disposed of, should be appropriated as a fund for the payment of these legacies. And Maria agreed to receive her legacy and to execute to the devisees, and to the executors, a full and absolute release of all claims upon the real or personal estate. As the complainants chose to call for the defendant's answer, on oath, in relation to the alleged fraud in obtaining these releases, instead of attempting to prove the same by witnesses, or of calling upon the subscribing witnesses to prove the circumstances



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under which such releases were given, the defendant is entitled to the full benefit of his answer, in explaining those circumstances, to rebut the charges of fraud and imposition contained in the bill. It is also proper to observe that there is no admission in the answer that the defendant was advised, by his professional friends, that the daughters would be entitled to their distributive shares in the personal estate after the death of the widow; though I infer from the defendant's answer, and from the fact that he was advised to take releases to prevent future difficulty, that he had been informed the will might bear such a construction. But the principal point in which the will was supposed to be different from the actual intention of the testator, was in not appropriating the moneys at interest, and other personal property not fully disposed of by the will, to the payment of the legacies during the life of the widow; instead of charging them upon John and George personally, without furnishing them any means of payment during the life of the widow, except by sacrificing the whole of their future interest in the farm and stock and farming utensils. None of the parties claiming under the will had a right to prove a mistake therein, for the purpose of altering their respective interests in the testator's estate, or of giving a different construction to its provisions. But if the members of this family were satisfied, from the information of those who were present when the directions for drawing it were given, that such a mistake had occurred, that circumstance might account for the giving of these releases without any actual consideration therefor; and would be a strong circumstance to rebut the presumption of fraud in obtaining them.

I infer from the expression in the release of Hager, reciting that it was given in consideration of \$700 *theretofore* paid him by the defendant, and from the allegation in the bill that the legacy was paid a *long* time before the death of the widow, that the release executed by Hager was not in fact given at the time the legacy was paid; but that it was subsequently executed. If so, it would corroborate the defendant's allegation, in the answer, that previous to the payment of the legacy Hager had agreed to receive the same, and to execute a full and absolute

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release of all claims upon the real and personal estate of the testator; and that the release was subsequently executed in pursuance of his previous agreement. But, as the release was actually executed before the death of the mother, it may admit of some doubt, from the conflict of authorities on the subject, whether the language of the release was sufficient to reach a then vested interest in personal property, but which interest could not be reduced to possession during the life or widowhood of the testator's widow. It therefore becomes necessary to examine the question, whether these legacies were chargeable exclusively upon the devisees, and upon the property specifically devised and bequeathed to them in remainder after the death or remarriage of the widow, in exoneration of the supposed reversionary interest in the personal estate undisposed of by the will; or whether such reversionary interest was the primary fund for the payment of such legacies.

I agree with the present Lord Chancellor of Ireland, that the soundest and most sensible rule of construction, both as to debts and legacies, would have been, that if there are express words of dedication of a portion of the real estate for the payment of debts or legacies, and the testator has disposed of all his personal estate specifically, the fund which the testator has himself provided for the purpose should be deemed the primary fund. The current of the authorities, however, is certainly the other way so far as relates to the payment of debts, at least, (*Fereges v Robertson*, *Bunb. Rep.* 301. *Waller v. Jackson*, *Idem*, 303, *n Aldridge v. Lord Wallscourt*, 1 *Ball & Beatty*, 312. *Ancaster v. Mayer*, 1 *Bro. C. C.* 460. *Stephenson v. Heathcote* 1 *Eden's Rep.* 38. *Howe v. Dartmouth*, 7 *Ves. Rep.* 149 *Watson v. Birchwood*, 9 *Idem*, 447. *Bootle v. Blundell*, 1 *Mer. Rep.* 193.) It is also the general rule that the personal estate is the primary fund for the payment of legacies, although such legacies are charged upon real estate; whether such real estate be devised with a direction to the devisee to pay the legacies, or is charged with such legacies, or given to trustees for that purpose. (See 1 *Roper on Leg.* 163, and cases there referred to.) But in reference to legacies, an absolute disposition

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of all the personal estate of the testator, and not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the realty, in exoneration of the personalty. Thus in the case of *Kelsey v. Deyo*, (3 *Cow. Rep.* 133,) where the testator bequeathed his whole personal estate, after payment of debts, to his wife for life, with remainder to all his children at her death; and then devised all his real estate to his son N. in fee, subject to certain privileges therein in favor of the widow; and directed him to pay certain legacies, one half thereof in two years after the testator's death and the other half in two years after the death of the widow; and made the devisee and other persons executors; the supreme court held that it was manifest from the will that he meant to exonerate the personal estate. But in the subsequent case of *Tole v. Hardy*, (6 *Cow. Rep.* 333,) where the testator directed that his widow should be maintained out of his estate, and that she should have all his furniture &c., and then devised his real estate to his son in fee, and directed him to pay certain legacies, and appointed the widow executrix and the devisee the executor of the will; the same court held that the personal estate, not specifically bequeathed, was not exonerated, and was the primary fund for the payment of the legacies; although the devisee was also charged with the payment, in respect to the land devised to him. And I have not been able to find any case, where the personal estate was not in terms exonerated, or the legacies declared to be chargeable upon the real estate exclusively, in which an interest in personal property not disposed of by the will was held to be exonerated. On the contrary, it appears to be settled that where the personal estate is in terms exonerated, for the benefit of a particular legatee, and not for the benefit of such estate generally, the failure of the particular bequest destroys the exoneration pro tanto. (*Ward's Law of Leg.* 357.)

It is not necessary to express an opinion upon the question, whether the life interest of the widow in the part of the personal estate not disposed of by the will, in the present case, was in fact exonerated from the payment of the four legacies, to the testator's son Lambert and to the three daughters. But upon an ex-

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amination of the decisions of the courts, both here and in England, I am satisfied that the reversionary interest in a part of the personal estate, which interest was not disposed of by the will, was the primary fund for the payment of those legacies; and in aid of the charge upon the farm, and upon the reversionary interest of the devisees in the stock and farming utensils. And as the personal property not disposed of by the will, was wholly insufficient to pay these legacies, with interest thereon from the time they became payable until the death of the widow, it follows that the complainants had no interest in the estate of the testator, beyond the amounts due upon their legacies, which could be affected by these releases.

The decree of the vice chancellor must therefore be reversed and the bill of the complainants must be dismissed, with costs

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## WINSLOW vs. PITKIN &amp; KIBBEE.

Where a judgment, recovered in the superior court of the city of New-York, or in a court of common pleas, is docketed in another county, a creditor's bill cannot be sustained upon the return of an execution to the clerk's office of the county in which the judgment is so docketed. To authorize the filing of a creditor's bill, the execution must have been duly returned and filed with the clerk of the court from which such execution issued.

After the return of an execution unsatisfied, the plaintiff filed a creditor's bill against the judgment debtor, and thereupon the defendant and a third person gave a note as collateral security for the payment of the debt and costs, but without discharging the judgment, or discontinuing the creditor's suit; the note not having been paid at maturity, a new judgment was recovered thereon against the judgment debtor and his surety; *Held* that it was improper to file an original creditor's bill, upon the last judgment, and to continue the proceedings in the first suit; but that the proper course was to file a supplemental bill.

THE complainant recovered a judgment, and upon the return of an execution issued thereon unsatisfied, he filed a creditor's bill against the defendant. The defendant thereupon procured the other defendant in the present suit to sign a note with him as collateral security for the debt and costs, or a part thereof, and

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the complainant agreed to stay the proceedings upon the creditor's bill until such note became due. The note not having been paid at maturity, the complainant brought a suit upon the note and recovered judgment in the superior court of the city of New-York against both defendants. He afterwards procured the judgment to be docketed in Queens county, and issued an execution to the sheriff of that county, who returned the execution to the office of the clerk of Queens county, unsatisfied.

*R. F. Winslow* applied for the appointment of a receiver.

*I. Harris*, for the defendants, objected that the execution was not properly returned; and that the last bill was irregular and improper.

The CHANCELLOR said, the complainant had overlooked the amendatory act of April, 1844, (*Laws of 1844*, p. 91, § 4,) which required the execution in such a case to be returned to, and filed with the clerk of the court from which it was issued; and that a creditor's bill could not be filed upon the last judgment until the execution was duly returned, unsatisfied, and filed with the clerk of the court out of which it issued. He also said that this was not a proper case for the filing of an original bill, upon the last judgment, and at the same time continuing the original suit in this court for the recovery of the same debt; that the complainant should either have dismissed his original bill, against one of these defendants, or have filed a supplemental bill, founded upon such original bill and upon the new facts; so that the whole matter could be disposed of together, in the original and supplemental suits.

Motion for receiver denied.

## MORSE vs. HOVEY and others.

The voluntary provisions of the bankrupt act of the United States, passed in 1841, are not unconstitutional.

A discharge of a bankrupt, in conformity to such provisions, is valid as respects pre-existing debts, as well as debts contracted by the bankrupt subsequent to the passage of that act.

Where a defendant in a suit at law has a defence of usury, which he can establish, by a competent witness, without a discovery from the alleged usurer, but where he is so situated that he cannot avail himself of the testimony of that witness in the suit at law, he may resort to the court of chancery for relief. And he is not bound to rely upon the testimony of the real plaintiff in the suit at law to prove the usury.

Where several persons who are made defendants, in the court of chancery, have no joint and common interest, so that the answer of one will not be evidence for or against the other upon the hearing of the cause, the complainant may waive an answer on oath as to one of them, and may call for a sworn answer and a discovery from the other.

THIS was an appeal from a decretal order of the assistant vice chancellor, overruling a demurrer to the complainant's bill. The facts of the case, and the opinion of the assistant vice chancellor, will be found in the report of the case before him. (1 *Sand. Ch. Rep.* 188.)

*T. Jenkins*, for the appellants.

*G. F. Comstock*, for the respondent.

THE CHANCELLOR. I concur in the opinion of the majority of the justices of the supreme court, as expressed in the case of *Kunzler v. Kohaus*, (5 *Hill's Rep.* 317,) that the voluntary provisions of the late bankrupt act were not unconstitutional; and that the discharge of a bankrupt, in conformity to such provisions, is valid as to pre-existing debts, as well as to debts contracted by him subsequent to the passage of that act. The federal constitution prohibits the states from passing any laws impairing the obligation of contracts. And congress has no such power, either as to previous or future contracts, except what is given to it in the constitution itself, in express terms or by necessary implication. But the power to establish uniform laws on

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the subject of bankruptcies throughout the United States, is expressly given to congress. And I think the framers of the constitution did not intend to limit the power to any particular class of persons; or to confine it to cases where a creditor, either nominally or in fact, was the party who instituted proceedings for the discharge of the bankrupt, or for the distribution of his property or effects among his creditors. It is true, that at the time of the adoption of the constitution of the United States there was a bankrupt law, in England, which only allowed a privileged class to be discharged from their debts, with the consent of a part of their creditors. And to entitle a bankrupt belonging to that class to the benefit of a discharge, or to compel him to give up his property for the payment of all his creditors equally, it was necessary that the proceeding should be instituted, at least nominally, by a creditor who had a debt against the bankrupt of not less than a certain specified amount. But this state had at that time a law in existence, which entitled the bankrupt to a discharge on his own application, in conjunction with a portion of his creditors, upon a surrender of his property. And the same law authorized a compulsory proceeding against him to compel a surrender of his property, with the consent of a part of his creditors only; provided he was a trader and had committed an act of bankruptcy by remaining in prison upon execution in a civil suit. That law also applied to pre-existing debts as well as to those which should be contracted afterwards. And probably most of the states which then constituted the confederation, had laws which authorized the discharge of a bankrupt debtor, with the consent of a portion of his creditors, upon a voluntary surrender of his property on his own application. It was undoubtedly in reference to the state of American legislation on the subject, and not to the principles of the English bankrupt law, that these provisions of the constitution, depriving the states of the power to impair the validity of contracts, but giving to congress the power to do so by establishing uniform laws on the subject of bankruptcy, were adopted. Mr. Justice Cowen has shown that, at the time of the adoption of the constitution, the word bankrupt, in its ordinary acceptation, was not confined to

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that class of insolvent debtors who had been guilty of some improper act, to defraud their creditors, or to delay them in the collection of their debts; but that it also was applied to those who, by misfortune, were unable to pay. Nor was it confined to those who were proceeded against adversely by their creditors, to compel a surrender of their property so that it might be applied to the payment of their debts. It may also be proper to remark, that in some of the acts of *sederunt* in Scotland, the term bankrupt is applied to insolvent debtors who apply, as against their creditors, for the benefit of a decree of *cessio bonorum*, to exempt them from further molestation on account of their debts while they remain insolvent. Thus the act of the 18th of July, 1688, declares that "in time coming when a *bankrupt* shall raise a process of *cessio bonorum*, against his creditors," &c. (1 *Acts of Sederunt*, 181.)

The assistant vice chancellor was right, in this case, in supposing that the discharge of the principal debtor, under the bankrupt act, exempted him from future liability to the complainants, as his sureties, in case they shall hereafter be compelled to pay the debt for which the proceeding at law was instituted. Nor does the fact that the plaintiff in the suit at law has taken issue there upon his plea of discharge under the general bankrupt law, render him a necessary party here; or preclude him from being a witness in this court to establish the fact of usury. The bill shows that Thayer, the principal debtor, was legally discharged under the bankrupt act; and that the issue was taken upon his plea, for the mere purpose of preventing him from being a witness for his co-defendant, in the action at law. Upon this demurrer those allegations in the bill are to be taken to be true. And if so, Thayer has a perfect defence to that suit, and is not interested in establishing the fact of usury here, to exempt himself from a recovery by the plaintiff in the suit at law. I also concur in the opinion of the assistant vice chancellor, that if the complainant can establish this defence of usury by a competent witness, without a discovery from the alleged usurer, but is so situated that he cannot avail himself of the testimony of that witness in the suit at law, he may resort to this court for



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relief. And he is not bound to rely upon the evidence of the real plaintiff in the suit at law, who is directly interested to prevent the establishment of a defence.

It only remains to consider the question whether the complainants were authorized, in this case, to waive an answer on oath as to one of these defendants, and to call for a sworn answer and a discovery from the other. Where the defendants have no joint and common interest, so that the answer of one would not be evidence for or against the other upon the hearing of the cause, there can be no valid objection to a waiver of a sworn answer as to one defendant and not as to the other. And so this court decided in the case of *Bulkeley v. Van Wyck*, (5 *Paige's Rep.* 536.) Here, if the allegations in the bill are true, the defendant Cloyes has no interest in the subject matter of the suit, in the court of law, to recover the amount of the note. And that fact being admitted by the demurrer, the objection that an answer on oath from the actual plaintiff in that suit, and the only real defendant here, is waived, while a sworn answer from the nominal plaintiff is required, does not appear to be well taken by such demurrer. It is not necessary now to consider whether any discovery or admission which may be made in a separate answer of Cloyes can be used as evidence against his co-defendant for any purpose; or what would be the effect of a joint answer of these defendants, put in upon the oaths of both. These are questions which will more properly arise upon the hearing of the cause upon the pleading and proofs.

The decretal order appealed from is affirmed with costs. And the defendants must file and serve their answers within twenty days after service of a copy of the decree of affirmance.

## ANONYMOUS.

To entitle a complainant to an order authorizing him to be examined as a witness, to prove the facts stated in his bill, against an absent defendant who has not appeared in the cause, it should be stated in the bill, and sworn to, that the complainant has not the means of proving the matters which he wishes to establish, except by his own oath, without an answer and discovery from the absent defendant.

THIS was an application for a reference to a master to take proof of the facts stated in the bill, as against an absent defendant who had not appeared in the suit.

*J. Forsyth* asked for a provision to be inserted in the order, authorizing the complainant to be examined, to prove, by his own oath, the facts stated in the bill.

THE CHANCELLOR said, it was not a matter of course to permit the complainant to be examined to prove the allegations in the bill, as against an absentee. He said the complainant should state in his bill, and verify it by his oath, that he cannot prove the matters charged in the bill, except by an answer and discovery from the absent defendant, unless he is permitted to prove them by his own oath. That upon such a bill, inasmuch as a discovery could not be obtained from an absentee who did not appear, the complainant might be permitted to prove the facts as to which a discovery from the defendant would be necessary, if he appeared in the cause; and did not suffer the bill to be taken as confessed against him after such appearance.

**BRYAN and others vs. KNICKERBACKER.**

Where A., by a deed executed previous to the revised statutes, conveyed all his real and personal estate to B. in trust that such trustee, or his assigns, or such other person or persons as he should by will appoint for that purpose, should dispose of, lease and manage the trust property, and receive the rents and income, and after deducting the expenses of the trust, should apply so much of the rents and income to the use and support of the grantor, and of his family, during his life, as the trustee should deem discreet and reasonable, and should invest and accumulate the residue of such rents and income for the benefit of the heirs of A.; and on the further trust, upon the death of A., to account for what should remain of the trust estate, and of the accumulations of the rents and income, to the heirs at law and next of kin of the grantor; *Held*, that under the law as it existed previous to the revised statutes, a person not in debt had the right to give his personal property to a trustee, for the use and benefit of those who should be the next of kin of the donor at the time of his death. And that such trust was valid, not only as to the grantor, but as to all persons claiming under him by title subsequent.

*Held also*, that as A. could not have defeated this trust by any act of his own, his creditors, whose debts arose subsequent to the creation of the trust, were not entitled to satisfaction of their debts out of the capital of the estate.

*Held further*, that the trust to receive the rents and income of the trust property, during the life of the grantor, to apply such part thereof to his support as was necessary, and to accumulate the residue for the benefit of his next of kin, at his death, was valid. But that such a trust would not be valid, under the provisions of the revised statutes.

*Held also*, that the provision, in the deed of trust, for the support of the grantor, for life, out of the income of the trust property, created an interest in such income which could be reached by judgment creditors of the grantor, by a creditor's bill in the court of chancery, upon the return of executions at law unsatisfied.

Limitations of contingent remainders in personal property, made previous to the revised statutes, are valid; provided the absolute ownership of the property is not suspended beyond the period allowed by law.

Where a *cestui que trust* has a beneficial interest in a fund, for his support and maintenance, under a valid trust created previous to the revised statutes, such interest will pass to his assignees in bankruptcy, or under the insolvent acts, or by his own voluntary assignment to a third person. Consequently it may be reached upon a creditor's bill; especially where the trust fund has proceeded from himself, and not from a third person.

THIS was an appeal by the defendants from a decree of the late vice chancellor of the second circuit. In May, 1828, the defendant, N. V. Knickerbacker, conveyed to his father, J. Knickerbacker, the other defendant in this suit, all his real and

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personal estate, consisting of lands in various counties, and about \$15,000 in money then in the hands of the grantee. The conveyance was in fee, but upon the face of the deed it was declared to be upon trust, that the grantee, or his assigns, or such other person, or persons, as he should, by will, appoint for that purpose, should dispose of, lease, and manage the trust property as he, or they, should deem most beneficial for the purposes of the trust, and receive the rents and income; and after deducting the expenses of the trust, should apply from time to time, so much of the rents and income to the use and support of the grantor, and of his family if he should marry and have a family, during his natural life, as the grantee, or the person or persons so appointed by him to execute the trust, should deem discreet and reasonable, and should invest and accumulate the residue of such rents and income for the benefit of the heirs of the grantor. And upon the further trust, on the death of the grantor, to account for what should remain of the trust estate, and of such accumulations of the rents and income, to the heirs at law and next of kin of the grantor, in the manner and in the proportions prescribed by the statutes of descent and distributions of this state in cases of intestacy. The trustee took possession of the trust property, under that conveyance, and out of the rents and income of the trust property allowed the grantor \$900 a year, for his support; he being a single man. The residue of the rents and income of the trust property was accumulated, except some small advances made to the grantor from time to time; which accumulations, at the time of putting in the answers in this cause, amounted to about \$9000; in addition to the property originally assigned, and to the advances which had been made to the grantor from time to time for his support and for the payment of his debts.

In 1841, Bryan, one of the complainants, recovered a judgment, in the supreme court, against N. V. Knickerbacker, and issued an execution thereon, which was returned unsatisfied in part; leaving due on that judgment, at the time of filing the bill in this cause, about \$81. And Huntington, the other complainant, recovered another judgment against him, in that court.

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the same year, for about \$240, upon which an execution was issued and was returned wholly unsatisfied. The bill in this cause was thereupon filed, to obtain satisfaction of the amounts due upon those judgments respectively, out of the interest of N. V. Knickerbacker in the assigned property. The facts of the case not being in dispute between the parties, the cause was heard before the vice chancellor upon bill and answer, in connection with certain admissions of the parties. He decided and decreed that the complainants were entitled to have satisfaction of their respective judgments, and their costs in this suit, out of the rents and income then accrued, or thereafter to accrue, upon the real and personal estate embraced in the trust deed, and out of the capital of the personal estate conveyed by such deed; and that the trustee should pay the said judgments and costs accordingly. The vice chancellor further directed and decreed, that if the judgments and costs were not paid, by the trustee, within thirty days after the service of such decree and of the taxed bill of costs, the complainants might apply for the appointment of a receiver of the trust property, or for a sequestration thereof; and for such further, or such other, order, or relief, as might be equitable and proper. From this decree, both of the defendants appealed to the chancellor.

The following opinion was delivered by the vice chancellor :

RUGGLES, V. C. It is not necessary for the complainants in this case to impeach the validity of the trust deed made by the defendant N. V. Knickerbacker to his father in 1828. They are entitled to relief out of the income of the trust fund, on the basis that the deed is valid, and that N. V. Knickerbacker's equitable interest is subject to the payment of his debts. It is not to be understood, however, that the allowance to him is to depend, as between him and his father, entirely and finally upon the arbitrary discretion of the latter as trustee. The exercise of that discretion is subject to the regulation and control of this court; so far, at least, as to prevent its abuse. N. V. Knickerbacker has a vested interest, therefore, in the income of the fund,

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according to the trust deed, in a sum sufficient for his support and maintenance.

It is a mistake to suppose that he can enjoy the allowance in defiance of his creditors. It is, like any other chose in action, liable to be applied to the payment of his debts. It is property, and has the incidents of property; and cannot be placed beyond the reach of his creditors. It would pass to the assignee of the cestui que trust under the insolvent laws of this state. The interest of a cestui que trust is assignable. Trusts cannot be created with a proviso that the interest of the cestui que trust shall not be aliened, or shall not be made subject to the claims of creditors. (*Lewin on Trusts*, 138. *Snowden v. Dales*, 6 *Sim.* 524. 1 *Id.* 66. 18 *Ves.* 429. 1 *Russ. & Myl.* 395.) By the revised statutes, (1 *R. S.* 724, § 63,) it is provided that no person beneficially interested in the receipt of the rents and profits of lands can assign, or in any manner dispose of such interests. But this deed, bearing date in 1828, is not affected by the article of the revised statutes respecting uses and trusts; nor by the first section of the article of the revised statutes respecting fraudulent conveyances. (2 *R. S.* 73, § 8.)

The case of *Hallett v. Thompson*, (5 *Paige*, 583,) was not precisely like this. The testator, in that case, bequeathed to Thompson, the judgment debtor, \$4000, which, however, was to be retained in the hands of the executors, in trust for him, unless Thompson should require it to be paid to himself. And the will declared that neither the legacy nor the interest thereof should be liable to the creditors of the legatee. The chancellor determined that the legacy being perfectly under the control of Thompson the legatee, would pass to his assignees, under the English bankrupt or insolvent laws, or under the insolvent laws of this state; and that it ought, therefore, to be applied to the satisfaction of the complainant's judgment, in that case.

In the case now under consideration, the allowance to N. V. Knickerbacker appears, by the terms of the trust, to depend on the discretion of his trustee; and in that respect differs from the case of *Hallett v. Thompson*. But it has been already said that the discretion must be reasonable, and is under the regu-

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lation of a court of equity. And therefore N. V. Knickerbacker's right to an allowance is as much his property as the legacy was the property of Thompson, in the case last mentioned. The difference between the two cases is therefore immaterial. The case of *Piercy v. Roberts*, (1 *Mylne & Keene*, 4,) is more like the present. There T. Roberts, by his last will, made in January, 1829, bequeathed to his executors £400, in trust to pay and apply, and dispose thereof, and of the interest and produce thereof, to the use and benefit of his son Thomas J. Roberts, in such smaller, or larger portions, at such time, or times, immediate, or remote, and in such way, or manner, as they, the executors, should, in their judgment, think best. And in case of the death of his son before the £400 and interest had been applied for the purposes aforesaid, the testator directed that the unapplied part thereof should sink into the residuary portion of his estate, and go as was in his will afterwards mentioned. And the testator died in July, 1829, and his son Thomas J. Roberts, in May, 1830, took the benefit of the insolvent debtor's act. He had received from the executors some portion of the £400 before May, 1830, and some portion after his discharge and before the filing of the complainant's bill. The bill was filed by his assignees, against the executors, to recover so much of the £400 and interest as remained unpaid at the time Roberts was discharged under the insolvent act. It was argued, in behalf of the executors, that the legatee, or cestui que trust, took no vested interest in the £400, because the payment was in the discretion of the executors; but more especially because there was a limitation over to the residuary legatee in the event of the whole £400 and interest not being paid in the lifetime of the legatee. The master of the rolls, Sir John Leach, declared that the attempt to continue the insolvent in the enjoyment of the legacy notwithstanding his insolvency was in fraud of the law, and that the discretion of the executors terminated by the insolvency, and that the property passed by the assignment. This case shows not only that N. V. Knickerbacker's right to a sum sufficient for his support and maintenance out of the income of the trust fund may be subjected to the payment of his debts

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but that by his insolvency the discretion to be exercised by his trustee, as to the amount of his allowance, is ended and determined, and that his creditors are entitled to the whole fund which the trustee was authorized, under any circumstances, to apply towards his support and maintenance, or to so much as will be sufficient to satisfy their demands. This fund is the whole net income of the trust estate. (*See Brandon v. Robertson*, 14 Ves. 429, and *Graves v. Dolphin*, 1 Sim. 66.)

The graver question upon this trust deed is, whether it is not entirely void, so far as respects N. V. Knickerbacker's creditors. I mean the creditors whose debts accrued since the date and recording of the deed. In deciding that the complainant's judgment debts are to be satisfied out of the income of this trust fund, I have looked upon the fund in the same light as if it had proceeded from, and as if the trust had been created by, some person other than N. V. Knickerbacker himself. But the fund was originally his property. He has never sold it for value. On the contrary he assigned it in trust, reserving a substantial and valuable interest for his own use and benefit. And the trustee is his own father, on whose good will and affection he can be supposed to rely with all confidence at least for a most liberal administration of the trust. Apparently the object of the instrument was to provide against N. V. Knickerbacker's improvidence. If the estate had been conveyed in trust for his own use with a view to avoid the payment of debts which he intended afterwards to contract, it would have been fraudulent beyond all doubt. And why is it not equally so if the conveyance be made to avoid the payment of debts which he expected his own improvidence, or prodigality, would lead him to contract? Such debts may be perfectly honest and fair. If the creditor obtains his judgment at law, his debt must be so regarded. The debtor is legally and morally bound to pay. There is no suggestion on either side in this case, that N. V. Knickerbacker is a man of unsound mind, or incapable of conducting his own affairs. He must be regarded, like all other rational men, as the master of his own actions and of his own will. To convey away his property for the purpose of avoiding



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the payment of debts which he believes he shall voluntarily contract, is much the same thing as to convey it away for the purpose of avoiding the payment of debts which he intends to contract. Such an intent is fraud in fact. Neither the recording of the deed, nor express notice of its existence, will avail to uphold it.

Voluntary settlements of property are in many instances tolerated and supported against subsequent creditors. But I apprehend this is done in those cases only where there is no good reason to believe that the leading object of the settlement was to avoid future responsibility. The allowance which the trustee in this case would be bound to make to N. V. Knickerbacker, and which all parties doubtless expected would be made, and which in fact has been made, gives him a considerable credit and enables him to run in debt. This was its natural consequence, and must have been foreseen. If the object of the trust was to avoid the payment of such debts, it strikes me as at least extremely doubtful whether it can be supported as a transaction free from the taint of fraud. Those who would regard it as fair, look upon improvidence and prodigality as infirmities merely, and not vices. But they are moral infirmities when they are practised at the expense of others: and if, at the concoction of the trust deed, the parties had in view the consequences most naturally to be expected from it, it would be difficult to say that it ought to be upheld. But, I do not mean to decide this question. It is not necessary for the complainants' relief. They are entitled to have their judgments satisfied out of the income of the trust fund, which is sufficient for them. The complainants' costs must come out of the fund also.

*G. W. Kirtland*, for appellants. I. The amount due to the plaintiffs in each judgment being less than one hundred dollars, a creditor's bill upon those judgments cannot be entertained.

II. The trust deed is a good and valid deed in the law. It was made in 1828, before the revised statutes were passed. The grantor was not in debt, and he had a perfect right to convey and give away his property as he pleased; and the grantees

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acquired a vested interest under the deed. It was not fraudulent as to the existing creditors, because there were none. And as to subsequent creditors, it was not fraudulent in fact or in law. The bill does not allege or pretend that it was. It was recorded; and besides, the complainants had actual knowledge of the existence and terms of the deed. A trust deed may be made for any object not illegal, and that is not prohibited by statute. This deed was not for any object prohibited by statute, or that was illegal in itself. But the complainants have not framed their bill with the view to set aside the deed. On the contrary, the prayer is that the defendants may apply any moneys, property, real or personal, belonging to the defendant, N. V. Knickerbacker, or in which he is in any way beneficially interested or which is due from, or held in trust by, the defendant, John Knickerbacker, for N. V. Knickerbacker, to the payment of said judgments. By the deed, the trustee is to apply so much of the rents and income of the property to the use and support of the cestui que trust, as the trustee shall deem discreet and reasonable. It is only in the rents and income, therefore, (if in any thing,) that the cestui que trust has any beneficial interest. And inasmuch as the rents and income that have accrued are greatly more than enough to pay the complainants' demand, it is not deemed important to take up more time to show that the deed is a valid one. The most important inquiry in this case is, whether the cestui que trust has any such interest, under this deed, as can be reached by a creditor's bill.

III. We insist that N. V. Knickerbacker has no such estate, interest or right, under the deed, as can be reached by a creditor's bill. The statute, which is in affirmance of the common law, defines what may be taken under a creditor's bill. The language of the statute is, the court shall have power "to decree satisfaction of the sum remaining due on such judgment, *out of any personal property, money, or things in action belonging to the defendant, or held in trust for him*" &c. (2 R. S. 174 § 39.) The cestui que trust must have some estate, legal or equitable, or some right of action, or right to property or money, which could be enforced by him. Where by the trust deed

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money is to be paid to the cestui que trust in gross, it may be seized by a creditor's bill. Where the trustee, by the deed, is to apply enough of the income for the support of the *cestui que trust*, and he is vested with a discretion as to the amount, it is not seizable by a creditor's bill. In *Coster v. Lorillard*, (14 *Wend.* 322,) in the court of errors, it was held by Chief Justice Savage, that in a trust deed to receive rents, &c. and to apply them to the use and support of a person, the trustee was *to judge of the propriety of the expenditure*; and that it was different from a direction to receive and *pay over*. Senator Maison says, at page 353, it is a discretionary power. Senator Young says, at page 382, *to pay* a gross sum, or *to apply to the use of*, are different; that the trustee in the latter case is required to deal out with circumspection. Here the trust is to collect and receive the rents, issues and income of the estate, and from time to time to apply to the use and support of the cestui que trust, during his natural life, so much of the rents, issues, and income as he, the trustee, should deem discreet and reasonable. Lewin lays down the doctrine that where the cestui que trust has a *vested* interest, it passes to his assignees in bankruptcy, and that the *mode* in which, or the *time* when, he is to enjoy such interest is immaterial. (*Lewin on Trusts*, 138.) In the case of *Snowden v. Dales*, (6 *Sim.* 524,) £800 was assigned to trustees, in trust, among other things, to allow and pay the interest of the £800 into the proper hands of the cestui que trust, or otherwise if the trustees should think fit, in procuring for him diet, lodging, wearing apparel and other necessities. There the cestui que trust had a vested right to the interest of the £800; it must all be paid to him or laid out for his benefit. And the court held it passed to his assignees in bankruptcy. In *Graves v. Dolphin*, (1 *Sim.* 66,) the testator devised his estate to trustees in trust, among other things, to pay his son John Graves an annuity of £500 for his natural life. This annuity was to be paid into the hands of the cestui que trust. He therefore, had a vested interest; and the court held that it passed to his assignees. In *Brandon v. Robinson*, (18 *Ves.* 428,) the testator directed that the share of his son Thomas Goom, should be laid out or invested in pub-

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lic stock in the name of trustees during the life of Thomas, and that the dividends, interest and produce thereof should be paid by them, into the cestui que trust's own proper hands. There too, the son had a vested interest, and the court decided that the right of the son to the dividends passed to his assignees. In *Green v. Spicer*, (1 *Russ. & My.* 395,) the devise was to trustees to *pay and apply* the rents, issues and profits of the property to or for the board, lodging, support and benefit of the cestui que trust. All the rents and profits *must* be applied to his benefit. The court decided that the cestui que trust took a vested estate. In the case of *Piercey v. Roberts*, (1 *My. & Keen* 4,) £400 was devised to trustees in trust, to pay, and apply, and dispose thereof, and of the interest and produce thereof, to the use and benefit of the testator's son Thomas. The terms, manner, and amounts to be given or applied at different times, were left at the discretion of the trustees. Thomas had a vested right to the interest and produce, and the trustees were bound to apply it. The time, mode and amounts were somewhat in the discretion of the trustees. The court held that his interest passed to his assignees. In each of the above cases, a specific fund was set apart, and all the interest and income thereof was to be paid to, or for the use of, the cestui que trust. The mode, manner, and times of applying it was in some cases, indeed, left to the discretion of the trustees. But the interest or income was given absolutely to the cestui que trust, and must all of it be paid to or for him; which it will readily be perceived, gave him a vested interest in it.

In the case now before the court, the trustee is, from time to time, to apply to the use and support of the cestui que trust so much of the rents, issues and income as he, the trustee, shall deem discreet and reasonable. The creditors of the cestui que trust cannot, most certainly, acquire a greater interest in the fund, or in the income of it, than he had himself. And it is submitted that he had no vested interest in it whatever. He voluntarily conveyed away the property, and gave to the trustee the right to apply so much of the rents, &c. to the use and support of the cestui que trust, and only so much, as he, the trustee, should deem discreet and reasonable. The cestui que trust made his trustee the sole judge

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in the case, as he had a right to do; and we submit that though the trustee should refuse to apply any of the rents or income to his use and support, the cestui que trust could have no remedy for it. I am aware that when a trust is created by one person for the benefit of another, if the trustee fails to execute it, chancery will compel the reasonable performance of the trust. But I have seen and know of no case where a man, competent and free to act, after having submitted his rights to the determination of another, can control such determination or discretion; unless fraud or corruption be shown. It having then been submitted, by the grantor in this case, wholly to the discretion of John Knickerbacker, as to how much of the income he should apply, or whether he should apply any of it to the use and support of the cestui que trust—we insist that N. V. Knickerbacker could not compel the application of the same to his support; and that he has no such interest in the income as can be reached by a creditor's bill.

But if N. V. Knickerbacker could compel a support out of the income, we contend it does not follow that his creditors can seize it. The trustee has the entire discretion as to the dealing it out. According to the deed he might deal it out by the meal. The reversion is given away to third persons, and the trustee is made the judge between the reversioners and the cestui que trust; and that by the act of the cestui que trust himself. And when the cestui que trust has no vested certain interest, but something depending altogether on the discretion of the trustee, it is believed it cannot be reached by a creditor's bill.

The deed having been made before the revised statutes, is as good and valid as if the trust had been made by a third person. It is admitted it would be otherwise now. In our own courts, no case, that I am aware of, has been decided like the present. The court of errors, in the case of *Coster v. Lorillard*, before referred to, seem to hold that such a deed would give no vested interest: and that public policy would require that such deeds should be favorably regarded.

In *Hallett v. Thompson*, (5 Paige, 583,) the cestui que trust had the right to reduce the principal sum to possession, and to ap-

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ply it to his own use by merely giving an order. There the court directed him to execute the order. He had the absolute and uncontrolled ownership of the property—a beneficial power which could be reached under the revised statutes. (1 R. S. 734, § 93.) In *Clute v. Bool*, (8 Paige, 83,) the court held that an annuity of \$400 to be paid to the cestui que trust was not seizable under a creditor's bill. It was also held that the instalments of the annuity were not seizable until they were due; unless they amounted to the payment of a gross sum. In *Hawley v. James*, (16 Wend. 165,) it was held that the mere right to enforce the performance of a trust is not assignable. And at pages 118 and 262, the court discuss the question as to what is the payment of a gross sum.

IV. If the defendant, N. V. Knickerbacker, under the deed, could compel a support and maintenance, still the complainants are not entitled to recover. They have no greater rights, as against the trustee, than he possesses; and he could not compel the advancement of moneys to carry on law suits, and to buy articles useless to himself.

V. If the complainants are entitled to any relief whatever, their demand is limited to such sum, barely, as the cestui que trust himself could claim against his trustee, from time to time, for his support. It is insisted that if the complainants are entitled to any thing, they can claim nothing beyond such portion of the income, from time to time, as would in itself be a discreet and reasonable allowance for the support of the cestui que trust. They certainly can claim no more against the trustee, and third persons interested under the trust deed, than their debtor could claim; they represent their debtor, and are subject to the same restrictions, in regard to the trust estate, as he would be were he litigating with his trustee respecting his claims under the deed. And in passing upon the amount that should be fixed and appropriated to the claims of these complainants and the other creditors, making up the amount of \$3000 debt which N. V. Knickerbacker contracted in so short a period, over and above the \$900 a year which was advanced to him out of the fund, it is claimed by the counsel for the defendant, John Knickerbacker, representing as

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he virtually does, the interest of persons who are not parties to this suit, that the sum shall be fixed at a discreet and reasonable amount; that it shall not be paid out in gross, to satisfy these judgments, and others which will no doubt follow. But, that being fixed at such a sum as with ordinary prudence would be sufficient to support the cestui que trust comfortably, but not extravagantly, that sum be paid over by instalments from time to time, by the trustee, in the same manner and under the same limitations as if it were to be paid to the cestui que trust, for his support. That this should be the rule is evident from the fact, that if payment be ordered in gross and at once, the cestui que trust might, by death, cease to have any claim for support long ere a pro rata allowance would make up the amount of the complainant's claims. By the deed, the overplus income of the estate, after providing for the support of N. V. Knickerbacker, was to be invested from time to time, for the benefit of his next of kin upon his decease, and to be accounted for by the trustee to such next of kin. The decree of the vice chancellor directs the judgments to be paid out of the profits and income in the hands of the trustee accrued since the deed, or hereafter to accrue, with costs, within thirty days. This is wrong. The funds invested for the next of kin should not be disturbed, and the decree should have been limited to the future income of the estate.

As to costs, should the chancellor decide that though the respondents, or either of them, are entitled to satisfaction of their claim against N. V. Knickerbacker, out of the income of the trust estate, yet, that their claim is not to a payment in gross, and at once, but that it should be under an allowance, and by instalments: then the respondent should not recover costs from the fund, but should pay costs, for the reason, that they should have applied to the trustee, and proposed to receive payment in that manner, before suit brought. And as to the appeal, should the decree be modified (though not set aside in toto.) as to the time and manner of payment, that being essential as to the rights of those interested in the trust estate, the respondents should pay costs. The decree at all events, should be modified so as to direct the defendants' costs to be paid out of the fund.

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*S. G. Huntington*, for respondents. I. The complainants are entitled to as much of the trust fund, in the hands of John Knickerbacker, as will be sufficient to pay their respective judgments and costs of this suit, according to the terms and intent of the trust deed. 1st. Because the fund is to be applied to the use and support of Nanning V. Knickerbacker the grantor. 2d. Although the funds are to be applied as the trustee shall deem discreet and reasonable, yet he is to use sound discretion and reason in their application; and is not at liberty, arbitrarily, to refuse an appropriation of any part of the fund, even when it is requested by the cestui que trust alone. 3d. But judgments having been obtained against the cestui que trust in a court of law, and no attempt having been made to impeach or reverse said judgments, the trustee is bound, by the terms of the trust deed, to pay the same; and an application of the trust fund for that purpose would be for the "use and support" of the cestui que trust, and therefore consistent with the terms of the trust. In other words, the judgments estop the trustee from the exercise of any discretion as to the application of funds to the payment of the complainants' claim. II. The whole of the rents, profits and income of the real and personal estate, together with the personal property held in trust by John Knickerbacker, belong absolutely to N. V. Knickerbacker, the judgment debtor, and are subject in equity to the claims of his creditors, at common law as well as by statute. 1st. Because the deed creating the trust estate or fund is void as against creditors; being created by the cestui que trust himself. 2d. Because it is an attempt on the part of the judgment debtor to place his property beyond the reach of creditors, for the use and benefit of himself and heirs. (3 *John. Ch. Rep.* 481. 4 *Kent's Com.* 303, note (c).) 3d. Because as to the \$15,008, the trust deed is null and void. (1 *R. L. of 1813*, 75. § 1. 2 *R. S.* 70, § 1, 2d ed. 5 *Cowen's Rep.* 547. 6 *Idem*, 288, and see especially the opinion of *Savage, Ch. J. in 5 Cowen's Rep.* 581.) 4th. Because the trust fund proceeding from, or having been created by the cestui que trust himself, he cannot claim a support therefrom as against his creditors; as in some cases he



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may, where the trust fund has proceeded from some person other than himself. (5 *Paige's Rep.* 583 to 587.) 5th. Because the revised statutes subject a trust fund created by the judgment debtor himself, (like the one under consideration,) to the claims of his creditors in equity. (2 *R. S.* 102, § 41, 2d ed.) 6th. At all events the surplus, beyond a support, can be reached for want of a valid direction for its accumulation. (8 *Paige*, 83.) III. The interest of the judgment debtor in the lands, rents, and real estate, conveyed by him to John Knickerbacker, in trust, could not have been sold under an execution at law. 1st. Because the trust being an active and not a passive trust, the legal title of the trustee is not divested by the revised statutes, but is thereby preserved. (1 *R. S.* 727, §§ 47, 48, 2d ed. 4 *Paige's Rep.* 345, 352.) 2d. Because the trustee does not hold the legal title as a clear simple trust for the benefit of the judgment debtor alone. (3 *Paige's Rep.* 478.) IV. The direction for the accumulation of the surplus rents, profits and income, is void; and the surplus is liable in equity to the claims of creditors. (1 *R. S.* 726, § 37. *Idem*, 729, § 57.) 1st. Because the accumulation is not for the benefit of minors living at the date of the trust deed, but for the benefit of the next of kin of the grantor. 2d. Because the next of kin is John Knickerbacker, the trustee, and the father of the grantor or cestui que trust. (2 *R. S.* 97, § 75, sub. 7.) V. It is no objection to the jurisdiction of this court that the judgment of the complainants, Barker and Gorham, is less than \$100. (See *Dix and others v. Briggs*, 9 *Paige*, 595, and *Sizer and others v. Miller*, *id.* 605.) VI. This case is to be governed by the revised statutes. (21 *Wend. Rep.* 147, 148. 1 *R. S.* 727, §§ 45, 46, 47, 48.) VII. If it should be said the complainants have no claim upon the income of the trust property, because they were not judgment creditors, or even creditors of N. V. Knickerbacker, at the date of the deed of trust, on the 10th of May, 1828, we insist that objection is not sustainable; because the trust property is, in law and equity, and in fact the property of the judgment debtor, and it is only important to inquire whether the debt sought to be enforced by means of a creditor's bill here, existed at the time

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of an assignment of his property by the debtor in those cases where the assignment transfers all the interest of the debtor in the property assigned. VIII. Huntington is entitled to payment of his judgment, at any rate; it having been recovered for services rendered by him in respect to the trust deed.

**THE CHANCELLOR.** The technical objection made by the counsel for the appellants, that the judgment of one of the complainants was less than \$100, cannot be sustained. That question was examined by this court in the case of *Sizer and others v. Miller*, (9 *Paige's Rep.* 605;) and the objection was decided to be invalid.

The vice chancellor has not, by the decree, in terms declared the trust created in this case void, as to the personal estate conveyed to the trustee. But he has done so in effect, by declaring that the judgments of the complainants, for debts created subsequent to the execution of the trust deed, were a charge upon such personal property, as well as upon the income thereof and upon the rents of the real estate; in which income and rents the judgment debtor was interested, to a certain extent, at the time of filing the bill in this cause, by the express provisions of the trust. It therefore becomes necessary to examine the question respecting the validity of the trust as to the capital of the personal property, conveyed by the trust deed, as well as to determine the rights of the respondents in relation to the rents and income of the real and personal estate conveyed in trust.

The trust having been created previous to the revised statutes, its validity or invalidity does not depend upon their provisions; but upon the law of this state as it existed previous to the first of January, 1830. It is not alleged, in the complainant's bill, that the object of creating this trust was to defraud the creditors of the grantor in the deed; nor is it any where stated that he owed any debt whatever at the time of the creation of the trust. The simple question presented, then, as to the validity of the trust, so far as relates to that part of the capital of the trust fund which consisted of personal property at that time is, whether as the law then was, a person not in debt had the right to give

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such property to a trustee, for the sole use and benefit of those who should be the next of kin of the donor at the time of his death. It is true, this limitation in remainder is, and must remain, contingent during the life of the donor; for it cannot be determined until his death who will be his next of kin, and entitled to the property according to the terms of the trust. But it is every day's practice to limit such contingent remainders in personal property and chattels real, through the medium of a trustee. And such limitations are valid, provided the absolute ownership of the property is not suspended beyond the period allowed by law. (*Lewin on Trusts*, 142.) This part of the trust, therefore, is valid, not only as to the grantor in the trust deed but as to all persons claiming under him by title subsequent. And as he could not in any way have defeated his trust by any act of his own, it is difficult to conceive how his creditors, whose debts have been contracted subsequent to the creation of this trust, can be entitled to satisfaction out of the capital of the personal estate; in which their judgment debtor has no interest. The part of the decree of the vice chancellor which declares that the complainants are entitled to have their judgments and costs satisfied out of the capital of the personal estate in the hands of the trustee, is erroneous and must be reversed.

Previous to the revised statutes, a trust for the accumulation of the rents of real estate, or of the income of personal property, might be created, to continue for the same length of time that the power of alienation, or the absolute ownership of such property, might legally be suspended. And the accumulated fund might be limited to any person or class of persons who should be in esse at the termination of such trust. (*Thelluson v. Woodford*, 4 Ves. 227; 11 *Idem*, 112, S. C.; *Rand. on Perp.* 197.) There does not, therefore, appear to be any objection to the validity of the trust to receive the rents and income of the property during the life of the party creating such trust, and to apply so much of the rents and income as may be reasonable and proper to the support of himself and his family for the same period; and to accumulate the residue, in the mean time, for the use and benefit of those who may be his next of

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kin at his death. It is true, such a trust for accumulating the rents and income of property could not now be created. For by the provisions of the revised statutes, a valid trust for the accumulation of the rents and profits of real estate, or the interest or income of personal property, can only be created for the benefit of a minor or minors who is or are in existence when the accumulation is to commence; and the accumulation must cease with the termination of such minority. (1 R. S. 726, § 37, 38. *Idem*, 773, § 3, 4.) But these provisions of the revised statutes cannot affect the validity of a trust of accumulation which had been created long before those statutes went into effect.

The trust for the accumulation of the rents and income, for the benefit of the next of kin, being a valid trust, in the present case, the only interest which N. V. Knickerbacker, the judgment debtor, had in the trust estate, was his right to a reasonable allowance for his support out of the rents and income thereof during his natural life. The part of the decree of the vice chancellor, therefore, which declares that the complainants are entitled to have their judgments and costs satisfied and paid out of the rents and income of the trust estate generally, is erroneous; and it must be reversed so far as respects that portion of the rents and income which, by the provisions of the conveyance creating the trust, are directed to be accumulated for the benefit of the next of kin.

But it appears that the amount which the trustee, in the exercise of the discretion vested in him by the trust deed, has hitherto considered a reasonable allowance for the support of N. V. Knickerbacker, as a single man, has been \$900 per annum; exclusive of some extra allowances occasionally made to him for the payment of debts. It is evident, therefore, that if this interest of the judgment debtor, in the rents and income of the trust property, could be reached by the complainants on a creditor's bill, the amount or value of such allowance for a single year, after they had obtained a lien thereon in the hands of the trustee, by the commencement of this suit, would be sufficient to pay their judgments with interest and costs. And as a year

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and a half had elapsed between the commencement of this suit and the decree of the vice chancellor, there was no necessity for resorting to that part of the trust property, and of the rents or income thereof, which was limited to the next of kin, to enable the complainants to obtain satisfaction of their debts and costs. Even if the amount of the annual allowance of \$900, which had accrued subsequent to the filing of the bill, had not been sufficient at that time, the decree could have directed satisfaction to be made, for any deficiency, out of the portion of the income to which the judgment debtor should thereafter be entitled, from time to time, under the provision of the trust deed for his personal support. For the interest of a cestui que trust in therents or income of trust property, under a trust of this kind, created previous to the revised statutes, was not inalienable by the cestui que trust. It would, therefore, pass to an assignee in bankruptcy, or by virtue of an assignment under the insolvent acts. And if so, it could also be reached by a creditor's bill, in anticipation, although the rents or income had not in fact accrued at the time of filing such bill. The case is otherwise as to the interest of the judgment debtor in such a trust created since the revised statutes. For as the interest of the cestui que trust is inalienable by him before the rent or income of the trust fund has actually accrued, the surplus, which the statute has specially authorized the judgment creditor to reach in that case, cannot be reached by such creditor by anticipation. (*Clute v. Bool*, 8 *Paige's Rep.* 83.)

It only remains to be considered whether the interest which the judgment debtor really has, in the rents and income of the trust property in this case, can be reached and appropriated to the payment of his debts. The fund out of which the provision for the support of the judgment debtor is derived, in this case, proceeded from him, or was created by himself. No question therefore arises, under the exceptions in the sections of the revised statutes relative to creditor's bills. (2 *R. S.* 174, §§ 41, 42.) But the question is whether his right to a reasonable allowance out of the rents and income of the trust property, is one which he could himself have enforced, either at law or in equity. It is

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insisted by the counsel for the appellants, that the judgment debtor has no vested interest whatever in this trust; and that if the trustee should refuse to apply any of the rents or income of the trust property to his support, he would be entirely without remedy. Such, however, cannot be a correct view of the law upon this subject. It is true the trustee, by the terms of the trust, has a very extended discretionary power as to the amount which is to be applied for the support of the cestui que trust. But the amount of the allowance which the trustee is bound to make does not depend upon the exercise of an arbitrary discretion, without reference to the situation of the cestui que trust and the amount of the property, or fund, out of which the allowance for his support is to be made. In other words, he is bound to make such an allowance as he honestly and conscientiously does deem discreet and reasonable, and not such as he shall merely *say* is reasonable. In this case, the trustee had been in the habit, for about fourteen years previous to the filing of the complainants' bill, of allowing the cestui que trust \$900 annually for his support. And if, without any diminution of the income of the trust fund, or change in the circumstances or habits of the defendant, or other apparent cause, the trustee had cut down the allowance to half that amount, no one could well suppose the trustee actually thought that allowance was discreet and reasonable. In such a case this court might come to the conclusion that it was an arbitrary and unconscientious exercise of power without right, amounting to a breach of trust, and might proceed to remove him from the trust; or might refer it to a master to inquire and report what was a reasonable allowance for the support of the cestui que trust, under the circumstances of the case, and direct the payment accordingly.

In the case of *Green v. Spicer*, (1 Russ. & Myl. Rep. 395,) the trustees were, by the will, directed to receive the rents and profits of the trust estate, and to apply the same to the support and benefit of the testator's son, during his life, in such manner as they might deem proper; such application to be at the entire discretion of the trustees. And the will further directed, that the son should not have the power to sell, mortgage or anticipate

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such rents and profits in any way. But the son being afterwards discharged under the insolvent act, Sir John Leach decided that the whole rents and profits should go to the assignee of the insolvent. A similar decision was made by the same distinguished equity judge, in the case of *Piercy v. Roberts*, (1 *Myl. & Keene's Rep.* 4.) There the trustees had an unlimited discretion to apply the trust fund for the use of the son of the testator, in larger or smaller portions, at such time or times, immediate or remote, and in such way or manner, as they in their judgment and discretion should think best. And in case of his death before the whole fund had been applied to his use, it was directed to sink into the residue of the testator's estate, and to be disposed of in the particular manner directed by the will. But the son, for whose use the fund was created, having been discharged under the insolvent act before the whole trust fund had been paid to him, the question arose whether the residue thereof should remain in the hands of the trustees, to be thereafter applied to his benefit, at their discretion, or should pass to the assignee of the insolvent. And the court held that the discretion of the trustees was determined by the insolvency, and that the fund passed by the assignment. The distinction between that case and the one now under consideration is, that in the first it was evidently intended that the whole trust fund should go for the benefit of the son at the discretion of the trustees, without reference to the question whether it might, or might not, be necessary for his support; while, in the last, the trustee has no right to devote any more of the income of the trust property to the support of the person who created the trust than he may deem reasonable for that purpose. And as to the surplus of such income, there is an absolute limitation of the same to the next of kin; except so much of that surplus as should be necessary for the support of his family, if he should marry and have a family. As the judgment debtor himself has no beneficial interest in such surplus, the complainants are not entitled to have it applied to the satisfaction of their debt.

The same distinction exists between this case and that of *Snowden v. Dales*, (6 *Sim. Rep.* 524,) which came before the

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vice chancellor of England two years after the decision of the master of the rolls in *Piercy v. Roberts*. There the sum of £800 was conveyed to trustees in trust, during the life of J. D. H., or during such part thereof as they should think proper, and at their will and pleasure but not otherwise, or at such times and in such sums as they should judge proper and expedient, to pay the interest of the £800 into his hands, or to apply the same, if they should see fit, in procuring for him diet, lodging, clothing, and other necessities; but so that he should not have any right or demand in or to such interest, other than such as they in their uncontrolled discretion should think proper and expedient, and so that none of his creditors should have any lien or claim thereon in any event. There was also a limitation over of the interest to his widow, after his decease, if he should marry and leave one; and an ultimate limitation over of the principal of the £800, and the *savings and accumulations of interest*, if any, to others; after the death of both. And yet it was decided, in that case, that upon the bankruptcy of J. D. H., the whole of the interest of the £800, during his life, passed to his assignees. The ground upon which that decision was placed by the court was, that although it was evidently the intention of the person creating the trust to exclude the assignees in bankruptcy, there was nothing in the deed which amounted to a direction to the trustees to withhold the payment of the interest, and to accumulate it during the life of J. D. H. for the benefit of the ultimate remaindermen, if they in their discretion should think proper to do so. But I confess I should have come to a different conclusion upon the question of construction. I should have held that the trustees had an absolute and arbitrary discretion on that subject; and that the assignees in bankruptcy were only entitled to so much of the interest of the trust fund as the trustees should not, in their discretion, think proper to retain and accumulate for the benefit of the ultimate remaindermen. This erroneous construction of the terms of the grant does not, however, impair the principle of the decision, that where a cestui que trust has a beneficial interest in a fund, for his support and maintenance, under a valid trust created previous to the adoption of the revised



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statutes, such interest will pass to his assignees in bankruptcy, or under our insolvent acts, or by his own voluntary assignment to a third person. And consequently, it may be reached upon a creditor's bill; especially when the fund so held in trust has proceeded from himself and not from a third person. The conclusion at which I have arrived, therefore, is, that the provision for the support of the judgment debtor, for life, out of the income of the trust property, created a beneficial interest which can be reached by this suit.

It was erroneous, in this case, to charge the costs upon the trustee personally; as he was litigating in good faith, for the protection of the trust fund, and could not safely have paid the judgments of the complainants otherwise than under the protection of a decree of the court. For although he was the next of kin, and the presumptive heir at law of his son, at the time of the commencement of this suit, the chances are against his surviving his son; so that his representatives will probably have to account to the children of the son, or to some other persons, as the next of kin, for the income of the trust fund beyond what is necessary and reasonable for the support of the son and his family, if he should have a family. Nor was it proper, in this case, to authorize the appointment of a receiver, to take the trust property out of the hands of the trustee, who was not alleged to be irresponsible; the property being held by the trustee for the benefit of those who will ultimately be entitled to the capital of the fund and to the accumulated income thereof. (*See Dick v. Pitchford*, 1 Dev. & Bat. Eq. Rep. 480.) All that the complainants were entitled to claim, was the payment of their debt and costs out of that part of the income of the trust property which properly belonged to their judgment debtor. And as the trustee had no right to pay that over to him, for his support, after the complainants obtained an equitable lien thereon by the commencement of this suit, the fund in the hands of the trustee at the time of the decree was probably sufficient, and will be paid without the necessity of further expense in taking the account thereof. The proper decree, therefore, would have been to direct the debts of the complainants, as ascertained by such decree, with the interest

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thereon, and their costs, to be paid by the trustee out of that part of the income of the trust property. And also to direct that if it was not paid within a limited time, the complainants be at liberty to go before a master, upon a reference, to inquire and report the amount of such income which had come to the hands of the trustee, or which might have been received by him with ordinary diligence; and which was applicable to the payment of such debts, interest and costs; with a direction that the trustee pay the amount so reported, or so much as was necessary for the purpose, upon the coming in and confirmation of the master's report; and if the whole amount should not thus be paid, that the complainants be at liberty to apply, from time to time, for further directions, periodically, as future rents and income which were applicable to that purpose should be received by the trustee.

The decree appealed from must be modified accordingly. And to the costs of the complainants in the court below, there must be added their taxable costs upon this appeal; to be paid out of the income of the trust fund. The trustee must be authorized by the decree to retain his costs, in the court below and upon this appeal, out of any part of the income of the trust property in his hands.

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THE UTICA COTTON MANUFACTURING COMPANY vs. THE  
SUPERVISORS OF ONEIDA COUNTY and others.

[Overruled, 11 Hun 527.]

It is a matter of course to give costs to a complainant, upon overruling a demurres to his bill; unless there is something very special in the case, to take it out of the general rule.

An appeal will not lie for the granting or refusing of interlocutory costs which are in the discretion of the court.

The estate of a corporation which is taxable as personal property, is only that portion of its capital which is not invested in real estate. But the capital of a corporation embraces the whole of its stock paid in, or secured to be paid; whether it is invested in real or personal property.

The principle of the revised statutes in regard to the taxation of corporations is, to tax the real estate of each corporation, except as to canal, turnpike, and bridge

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companies, upon its *actual* value, for the benefit of the inhabitants of the town and county where it is situated, in the same manner as the property of individuals is taxed. And to tax the residue of its capital, after deducting the *cost* of its real estate, as personal property; for the benefit of the inhabitants of the town and county where the financial concerns of the corporation are carried on.

Under the 9th section of the fourth title of the article of the revised statutes relative to the assessment of taxes on incorporated companies, &c, the real as well as the personal estate of a corporation, is exempted from taxation; provided a satisfactory affidavit is presented to the board of supervisors of the county in which such property is assessed, showing that such company is not in the receipt of any income or profits, either from its real or personal estate.

If such an affidavit is made, and filed with the clerk of the board of supervisors, within the time prescribed by the statute, it is the duty of such board to strike the name of the corporation out of the assessment roll.

But the board of supervisors should require the affidavit to be in such a form as to leave no doubt upon their minds that the real as well as the personal estate of the corporation is wholly unproductive; so that it yields neither rents nor income which are received by the corporation or its agents.

THIS was an appeal, by the defendants, from a decretal order of the vice chancellor of the fifth circuit, overruling a demurrer to the complainants' bill. The complainants were an incorporated manufacturing company, located in the town of New-Hartford, in the county of Oneida; and their bill was filed against the collector of the town, and the board of supervisors of the county, to restrain them from collecting a tax imposed upon the real estate of the complainants. The corporation was assessed upon its capital stock, exclusive of the cost of its real estate, and upon its real estate, in the town where it carried on its business. The president of the company, within the time prescribed by the ninth section of the title of the revised statutes relative to the assessment of taxes on incorporated companies, produced to the board of supervisors an affidavit, showing that the corporation was not in the receipt of any profits or income; and claimed to have both its real and personal estate exempted from taxation. The board of supervisors decided that the corporation was not liable to taxation upon its capital, and therefore struck from the assessment roll the part of its capital which was assessed as personal estate. But they also decided that its real estate was liable to taxation, and therefore refused to strike from the roll the assessed value of the real estate of the corporation

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situated in New-Hartford, and taxed the same, in the manner the real estate of individuals is taxed. There was a general demurrer to the bill for want of equity; which demurrer the vice chancellor overruled with costs.

*Charles Tracy*, for appellants. I. The vice chancellor erred in giving costs against the defendants. The board of supervisors are public officers merely; administering the department of taxation on behalf of the public. There is no propriety in requiring them personally to pay costs for correcting their errors. Nor should the funds in the hands of the board be charged with costs. The board acts quasi judicially, upon the presentation of the affidavit. The county is not affected by the disposition made of the affidavit; the county raises its aggregate tax, which is no more nor less on account of any exemptions to individuals. The county fund is the same, no matter who is made to pay the tax. Besides, the principle adopted by the board in this case had previously received the sanction of the attorney general, the legislature, and the supreme court.

II. The vice chancellor erred on the main proposition in the case. The board of supervisors were right in applying the exemption as they did, and imposing a tax on the real estate. (1 R. S. 416; 2d ed. 404, § 9.) - The particular section relied on by the complainants, when taken in connection with the residue of the statute, does not intend an exemption of real estate. 1st. The whole subject of assessment and collection of taxes is contained in chapter 13 of part 1 of the revised statutes, (1 R. S. 387; 2d ed. p. 379.) It is separated into several distinct titles, each complete in itself. Thus title 1st defines what property shall be subject to taxation; title 2d gives the mode of assessment; title 3d the manner of collecting taxes; title 4th prescribes regulations for assessing and collecting against corporations. Title 1st commences by declaring that all lands and all personal estate situated within this state, whether owned by individuals or corporations, shall be liable to taxation "subject to the exceptions hereinafter specified." (*Idem*, § 1.) It then defines certain terms, and declares that "personal estate" includes "such por-

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tion of the capital stock of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate." (*Idem*, § 3.) Then follows a section giving the *exemptions* referred to in section one. "The following property shall be exempt from taxation," enumerating things exempt by constitutional provisions, lands of the government, colleges, churches, &c., stock owned by literary and charitable institutions, and (by the 7th subdivision) "the personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter." (*Id.* § 4.) The result and effect of all these provisions is, that all lands and all personal estate are taxable, except as exempted; that exemption to a manufacturing company reaches its personal estate only; that such personal estate consists of its capital stock remaining after deducting what it holds in lands; and therefore the lands of such a company are never exempt, but always liable under the first section. It is idle to hunt about for other and inconsistent exemptions, and to endeavor to gather them by implication in subsequent titles, when the legislature has chosen this very place to collect and declare all the exemptions; and has grouped and arranged them with system and care. The arrangement of our statutes in chapters and titles, is an important feature in the revision. These divisions are material to the construction; they are significant and have important meaning; and they declare an intent of the legislature. To disregard or to slight them, would be to deny the essential principle, and reject the main advantage of codification. When therefore the first four sections of title one are read, it is known that no exemptions of the lands of an incorporated company is intended; and with this leading principle thus settled, one is prepared to look into the subsequent titles for the details of proceedings by which the design of the act is to be executed. 2d. The 4th title commences by declaring that all moneyed or stock corporations deriving an income and profit from their capital or otherwise, shall be liable to taxation on their capital. (1 R. S. 414; 2d ed. 415 § 1.) Such companies are to furnish to the assessors of the town where the office of the company is situated, certain statements, showing what part

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of the stock is held by charitable and literary institutions, and distinguishing the real and personal estates of the corporation. (*Id.* § 2.) The assessors of that town enter the name of such company in their assessment roll, with the gross amount of its capital; the amount invested in lands; and the amount held by literary and charitable institutions or the state, and the lands of the company in that town. (*Id.* § 6.) The 3d subdivision does not apply to manufacturing companies. Under the third head, in cases of manufacturing companies, the assessors are to set down the present value of the aggregate stock of the company, and deduct from it the stock held by literary and charitable institutions, and the state, and the amount invested in lands; and the residue after such deduction, together with the lands, constitutes the basis of taxation for that company. (*Id.* § 7.) Thus the distinction between real and personal estate is kept up throughout. The obvious reason for this is, that these provisions are preparatory to the process for relieving the personal estate alone from assessment. If the application of the exemption was to be to both lands and personal estate, the whole machinery devised for distinguishing between the two would be useless and insensible. These provisions have some design; they exist for some purpose; and it is just to infer the design and purpose from the use to which they adapt themselves; the enabling of a manufacturing company to escape a tax on personal, while it pays a tax on its real estate. Then follows section 9, which authorizes the presentation of an affidavit, and declaring that when the board becomes satisfied, "the name of such company shall be stricken out of the assessment roll, and no tax shall be imposed upon it." It is upon a strict verbal and literal construction of this language, the enforcement of the largest possible sense into every word, and the oblivion of all other provisions of the statute, that the complainants make their reliance. We contend against such a construction, and insist on the taking of the whole act into view in determining the true meaning of this part. This passage has reference to all the previous provisions, and is to be understood as indicating the manner in which the exemption of personal estate is to be accomplished, and not as declaring what property

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is entitled to exemption. The very next section proceeds on the assumption that what may be done under the 9th section, will yet leave something to be assessed against the company. The language of the 9th section merely imports that the name of the corporation as such, is to be struck out: that is, that whatever upon the roll is peculiar to it as a corporation, whatever property it holds in the manner peculiar to such an artificial person, its invisible stock, its artificial chattels, its effects of the sort that corporations alone, and not natural persons, can grasp, shall come out of the roll; but whatever it holds or is charged with on the roll in the same manner with natural persons, viz. its real estate, shall remain in the roll and be taxed. The company is assessed like individuals in respect of lands, but very differently as regards personal estate; and the true intent of this section is to strike from the assessment roll all these peculiar entries, the corporation assessment, and leave the land assessment standing.

3d. The particulars which are entered in the assessment roll, in the case of a manufacturing corporation, different from the assessments of individuals, are so entered in only one town, the town where the company has its office. In all other towns, wherein the company has real estate, the assessors are to enter the real estate on their roll in the same manner as if it belonged to an individual. (1 R. S. 389, § 1 to 6. *Id.* 2d ed. 380. 4 Paige, 394.) Now the board of supervisors are to strike the name of the company from that one roll in which the corporate stock is entered, and not from any other. The board seems to have no power over the assessments in other counties, nor even over any roll but the one which comes from the town where the company keeps its office and furnishes the statement to the assessors. Consequently the assessment of all the lands of a corporation beyond the limits of the town in which its office is situated; is not subject to the power of the board. This result harmonizes with our view of the subject; for we regard the exemption as relating to personal estate alone. But on the complainants' doctrine, it leads to the absurdity that all lands of their company within the town where their office is situated are exempt, and all their lands elsewhere are taxable; and

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thus prunes off from the section the words "no tax shall be imposed upon it. 4th. The policy of exempting manufacturing companies from taxation, does not require nor favor the exemption of their real estate. The privilege thus granted is limited to those years when the company receives no profits nor income from its capital. This has been explained and judicially declared to mean, that the company must be absolutely not in the receipt of any income at all; and if it receives any thing by way of income, and yet loses much more, it has not the privilege. (*People v. Supervisors of Niagara*, 4 Hill, 20.) The cases, therefore, in which the company can claim the privilege, usually are those in which the company has lain idle. But it often happens that the real estate of the company is large, and has risen in value during the year. Its factory site, its water right, its village of lodges, the lands it has acquired in payment of debts, the tracts it owns to secure a supply of ore, or wood, or coal, or water, may have risen while the wheel was still, and the company may have had a very good year and yet be within the terms of the section. The only just, or even tolerable way to make taxation equal in the case of these companies, is to assess the land always, and to relieve the personal property when an affidavit can be made. The legislature never intended to allow a company, under the name of a manufacturing corporation, to engross and hold large real estates, and by virtue of an old mill that cannot work, to escape the whole burden of taxation. Corporations of this sort are fabricated at will and can be dissolved at the volition of the stockholders. The privileges thus granted were not intended as a dispensation of the common duty incident to real estate, to bear the burdens of taxation. The provisions of the 2d title of the statute make the assessment of all lands local. Whether it is owned by individuals or corporations, the land is always entered on the assessment roll, and taxed in the town where it lies. Can it be held that the proceedings before the board of supervisors, in the county where the company holds its office, shall exempt from taxation the lands of that company lying in other counties and in parts remote from its factory, where property is not affected by the



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good or ill fortune of the company, and where taxable inhabitants derive no benefit from its business? 5th. It is believed that the practice of boards of supervisors has been like that of the present defendants. In Jefferson county, a different course was pursued till 1833, and since that time the board in that county is understood to have acted on the same principle for which we contend.

III. The views we advocate, have received a judicial sanction in the supreme court. (*See People v. Supervisors of Niagara, 4 Hill, 20.*) Mr. Justice Bronson gives his views of this question at page 26. The exemption goes only to the tax on the balance of the capital, after deducting the amount paid for lands, and the lands are taxed separately. He therefore holds that a rail-road company must pay tax on its real estate when its personal capital is exempt. The judgment in this case was affirmed in the court for the correction of errors in Dec. 1844. (*See 7 Hill, S. C.*)

IV. The same doctrine has had the sanction of a construction by the legislature itself. In 1833, The Black River Cotton and Woollen Manufacturing Company applied to the legislature for relief against a tax of \$200 and upwards. The ground of the application was, an accidental omission to file the affidavit with the board of supervisors. The following were the proceedings. A petition was presented and it was referred to the committee on the judiciary; who subsequently presented a written report. In this report the committee gave their opinion that the 9th section extends the exemption over the real and personal estate of the company; and being satisfied that the omission to file the affidavit was well explained, they recommended that the whole tax be relieved against; and they brought in a bill accordingly. (*Senate Jour. 1833, pp. 88, 94. Sen. Doc. 1833, Vol. 1, No. 21.*) A resolution was then adopted, requiring the attorney general to submit to the senate his opinion whether the exemption granted by the ninth section of title 4th of chapter 13th of the first part of the revised statutes, to certain incorporated companies, extends so far as to exempt the lands and real estate of said companies from taxation. Subsequently the attorney general, (now Chief Justice Bronson.) reported his opinion: sustaining throughout

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the views here put forth on behalf of the appellants. The subject is considered fully and carefully. (*Sen. Jour.* 1833, pp. 100, 116. *Sen. Doc.* 1833, Vol. 1, No. 33.) The bill passed the senate and became a law. (*See Sess. Laws of 1833*, p. 88.) Upon examining the act as amended and passed, it is seen that the views of the attorney general were adopted by the legislature; the exemption being granted only as to the personal estate, and the tax on the real estate being retained.

These proceedings were deliberate. The precise question now before the court, was the whole question then before the legislature. The committee gave an opinion in favor of exempting real estate; the senate doubted, and called for the attorney general's opinion; that officer reported an opinion that real estate was not exempt, and the question then came up in committee of the whole, and was discussed at two sittings. The bill prepared by the committee was amended in conformity with the attorney general's views, and was finally passed as amended.

We have, therefore, a legislative exposition of this statute, equivalent to an act declaring that the appellants' doctrine is correct. This should be the end of controversy. It was competent for the legislature to determine the meaning and effect of a statute, at least so far as subsequent cases could be affected, and in this case that power of the legislative department has been exercised on the most deliberate consideration, and in the most public and solemn manner.

*D. Wager*, for respondents. I. By the statute, the respondent was entitled to have its name struck from the assessment roll, and to be exempt from taxation. (1 *R. S.* 404, § 9.) The affidavit was in exact compliance with the statute. It was satisfactory to the board of supervisors, and they discharged the personal tax, in consequence.

II. The exemption is complete and final as to every portion of the assessment, whether it be on real estate, on capital, or on income. An attempt has been made to show that the real estate of a corporation does not fall within the statutory exemption, and is therefore taxable. But the statute itself makes no distinc-

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tion of property. Its express language is that if satisfactory proof be supplied according to the 9th section, "the name of the company shall be struck from the assessment roll, and no tax shall be imposed upon it." The name of the corporation cannot be retained for a portion of the tax, any more than for the whole. It must be absolutely struck off.

If the name of a *person* be struck from an assessment roll, clearly no tax can be collected from that person. He cannot be named in the collector's warrant. He is lost for all the purposes of taxation. It is the same with a corporation. If an assessment on the real estate of corporations were designed by the statute, and an exemption of the personal only, it was not difficult to express the distinction. Three or four simple words would have done it; and when it is remembered that the section in question has passed under a number of critical eyes before its enactment in its present shape, the fact that such a distinction has not been made, is strong evidence that it did not fall within the intention of the legislature. The law of 1817 (*see Sess. Laws 1817, p. 54*), appears to be the first statute containing the exemption. The exemption was confined to "all the buildings, machinery, and the manufactured articles in the hands of the manufacturer, of every cotton, woollen or linen manufactory within this state." This act was entitled "An act for the encouragement of manufactures within this state." Next in the course of legislation, appears to be the act of 1825, which was an act in relation to the assessment and collection of taxes. (*Sess. Laws, 1825, p. 374, § 7*.) This law appears to have been expressly aimed at corporations, which it seems had before that time contrived to evade taxation. The object of the legislature was to prevent this evasion, and to compel corporations to share the public burthens. It is not, therefore, in the least likely that a loop hole should have been left in that law, for their escape, unless it were left designedly. Banks and insurance companies were principally aimed at. But there was another sort of corporations which deserved to be fostered; and the more so, because they conduced to the public advantage, and at the same time were experimental, and uncertain of reaping a profit from their ven

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tures. Among these were manufacturing corporations. This statute, as well as that of 1817, looked upon them with a kindly eye; and all favorable exemptions consistent with wise legislation were allowed to them. Should their property prove unproductive, it was not deemed reasonable that it should be taxed; and a provision was therefore made in the statute, adjusting their burthens to their profits and income.

The first section of the statute of 1825, provides that the property of corporations, real as well as personal, should be inserted in the assessment rolls. The seventh section provides for the exemption of the whole from taxation, on the filing of an affidavit similar to that required by the provision in the revised statutes already referred to.

The revisers, and the legislature which adopted their report, must have intended this exemption: otherwise it could not have found its way into the existing statute, at least in its present connection. The sixth section fixes the details of the assessment roll very exactly, and provides that there shall be a column for the real estate of corporations, as well as one for their stock. (1 *R. S.* 404.) The seventh section declares that both real estate and stock shall constitute the amount on which the tax shall be levied. Then comes in the ninth section, on which the respondents rely, providing that under certain specified circumstances, no tax shall be levied, and that even the very name of the corporation shall be struck from the roll.

If any further evidence of the intention of the statute be required it may be found in the report of the revisers, where they expressly say that they paid particular attention to this matter of taxing corporations, on account of continued misapprehension on the part of assessing officers and boards of supervisors. (3 *R. S.* 501, 2d ed.) And in terms of good plain English, the ninth section covers every thing that the respondent claims: no tax shall be imposed; the name of the party shall be struck from the roll. It conveys a determination, as express and full as language can convey it, to cut off taxation in all its branches, under those circumstances which seem to justify any exemption whatever. The intention of the revisers is further shown by the

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fact that this very section was modified by them from the law of 1825; and the intention of the legislature is shown by the fact that they modified the section as reported by the revisers. (*See* 3 R. S. 496, 1 *Id.* 379, 380.) The statute which exempts the real estate of literary institutions, and of ministers of the gospel, from taxation, is not more explicit, nor more in conformity with the general spirit of the laws respecting taxation than this which allows a qualified exemption to corporations. And as well might assessors and supervisors embrace in the assessment roll the estates of colleges and clergymen, and put them to their remedy, as to fly in the face of an equally positive statute enacted for the benefit of corporations.

The case of The Black River Cotton and Woollen Manufacturing Company, referred to by the appellants, shows what was the construction of the law given by the supervisors of Jefferson county for years, and the construction which was obvious to the judiciary committee of the senate. The petition stated that for several years that company had not been assessed, in consequence of showing that it was not in the receipt of profits or income. The statute was regarded as an exemption. But an error occurring in filing the usual affidavit, a tax was finally imposed, which caused the application for relief. The opinion of the attorney general, to whom the matter was referred, was adverse to the construction of the statute contended for by the respondent, and was deemed authoritative by the legislature. In this court it can be regarded as of no more weight than its argument entitles it to; and it seems to be an effort of great ingenuity to explain away the force of the English language, and to infer intentions against a blunt and palpable provision of the statute.

The case referred to in 4 Hill's Reports, decides nothing that bears upon the present case. All the affidavits relied on were defective, and that was a sufficient reason for the judgment of the court. The dicta and suggestions are consonant, to a certain extent, as might be expected, with the opinion of the attorney general made to the legislature as before stated; but the case itself decides nothing that affects the respondent here.

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III. The appellants were properly charged with costs. Their legal duty was clear. By admitting the affidavit of the respondent, they exhausted all their discretion in the matter, and had no right to impose the tax. Even if they were disposed to doubt the policy of the exemption, there still was the law before them to dispel every doubt as to the fact of the exemption in a legal view. By imposing the tax, and attempting to collect it, they compelled the respondent to seek a remedy. He should not suffer for their error or wilfulness, and be at the expense of that remedy. They should be charged with it.

*Charles Tracy*, in reply. It is true, as the respondents' counsel states, that the first exemption from taxes given to manufacturing companies, was granted in 1817. But that exemption contained a discrimination in favor of personal estate, and against lands, nearly like the one now in force. The building, the machinery, and the manufactured wares were exempt; but the land was always subject to taxation. The exemption did not cover the water right, nor even the site of the factory proper. It was merely an exemption of personal estate, in the broadest sense of the terms, including those erections and fixtures which become personal property at the will of the proprietor; and left the land proper to be taxed in all cases. This act does not name incorporated companies; but the supreme court held that all corporations were included in the term "persons," and liable to the operation of the act. (*The People v. Utica Ins. Co.*, 15 *John.* 382.)

In 1823 an act "for the assessment and collection of taxes" was passed; (*Laws of 1823*, p. 390;) and it was subsequently held, by the supreme court, to be an abrogation of the act of 1817, and to leave manufacturing companies liable to taxation. (*Columbian Manuf. Co. v. Vanderpoel*, 4 *Cowen*, 557.) The 15th section of this act provided that on paying 10 per cent. of the profits, any incorporated company might be exempted from the tax on its personal estate; but left the real estate to the operation of the general laws on the subject of taxation.

The act of 1825 touches the question of exemption, in terms

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not free from doubt or ambiguity. On filing an affidavit of a certain kind, these manufacturing corporations "shall not be liable to *taxation pursuant to the provisions of this act.*" (*Laws of 1825, p. 375, § 7.*) What is meant by "taxation pursuant to the provisions of this act?" The statutes for the assessment and collection of taxes are not reduced into this act, not compiled with it, nor in any manner repealed, or impaired, by it. Those statutes made all lands of these companies subject to taxation. The passage in question, therefore, may be fairly construed to express an exemption of personal estates alone. Indeed, such an interpretation is the only one that can make any sense of the final part of the passage above quoted. The result of this examination is, that the lands and real estate of manufacturing companies always were subject to taxation, and were not within the exemptions.

As to the views of the revisers. Their various notes on title 2 and title 4 show a purpose of distinguishing between the real and personal estate of manufacturing companies, for the purpose of admitting an exemption of the personal at the place where the company has its office, and retaining a local tax on the real at the places where it may be situated. (*See 3 R. S. 2d ed. 496, 499, 500.*)

As to the costs. The respondents' counsel goes beyond the bill when he styles the behavior of the supervisors wilful. Nor can the board of supervisors be charged with acting upon a hasty impression, or counter to good advice, when they are sustained by a strict and just analysis of the statute, and the authoritative expositions of the supreme court, the attorney general, and the legislature itself.

THE CHANCELLOR. It is a matter of course to give costs to a complainant, upon overruling a demurrer to his bill; unless there is something very special to take the case out of the general rule. And if it were not so, an appeal will not lie for the granting or refusing interlocutory costs which are in the discretion of the court.

The only question worthy of consideration in this case, there

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fore, is whether the real estate of this corporation was liable to taxation, if it was lying entirely idle so as to produce neither rents nor income. That question depends upon the construction which is to be given to a great number of provisions contained in the chapter of the revised statutes relative to the assessment and collection of taxes; which, in connection with previous legislation, I will now consider.

It will be seen by referring to the act of April, 1823, for the assessment and collection of taxes, (*Laws of 1823, p. 395, § 14, 16,*) that previous to the revised statutes, the real estate owned by joint stock corporations, wherever situated, as well as their personal estate, was to be assessed and taxed in the town or ward where the office, or place of business of the company, was located. And that the amount of the town and county tax, when collected, was to be apportioned among the several counties of the state, in proportion to the stock held by individuals residing in such counties respectively. By the fifteenth section of the act of April, 1823, any such corporation was to be permitted to commute for the tax upon its *personal* property, that is, upon the amount of the capital held by individuals, exclusive of what was vested in real estate, by paying ten per cent. upon the dividends, profits, or income of the company. That section, however, was repealed by the amendatory act of April, 1825; and a new provision was substituted, allowing turnpike, canal, bridge, and manufacturing companies, to commute by paying five per cent. upon all of their profits and income; provided that income should not exceed five per cent. upon the capital stock of the company. Then came the provision exempting such corporations from taxation altogether, upon the production, to the board of supervisors, of an affidavit showing, to the satisfaction of that board, that the corporation was not in the receipt of any profits or income from its property. That provision, in the connection in which it then stood, must have been intended to exempt the corporation from taxation both upon its real and its personal property. But whether it then meant *net* income, so as to entitle the corporation to exemption if its expenditures and losses during the previous year had exceeded its receipts, or only



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to exempt it where there were no rents or profits of its real or personal estate, it is not necessary now to inquire or consider.

The revised statutes, subsequently passed, adopted somewhat different principles in the taxation of corporations, with the exception of bridge, turnpike, and canal companies, as to the place where the real estate of the corporation should be taxed. And the provision of the previous statute, requiring the taxes upon corporations to be paid to the state treasurer, and to be distributed among the several counties in which the stockholders resided, was also abolished. That this change in the pre-existing laws was deliberately and intentionally made, by the legislature, will be seen by referring to the report of the chapter relative to the assessment and collection of taxes, as originally made by the revisers. That chapter was drawn in conformity with the previous laws, requiring the real as well as the personal estate of corporations, which were liable to taxation upon their capitals, to be assessed in the town or ward where the principal office or place of business was situated. And it provided for the payment of the tax to the state treasurer, to be apportioned among the different counties in which the stockholders resided. (*See Rev. Rep. tit. 2, § 6; and Idem, tit. 4, § 23 to 27.*) But in conformity with the suggestion of the revisers, in their note to section six of the fourth title of that chapter, the legislature amended the sixth section of the second title, and passed it in the form in which it now appears in the revised statutes. And they also struck out the last five sections of the fourth title, which provided for a distribution of the taxes, upon joint stock corporations, among the several counties in which the stockholders should reside. The sixth section of the first title, as amended and passed, provides that "the real estate of all incorporated companies *liable to taxation*, shall be assessed in the town or ward in which the same shall lie; in the same manner as the estate of individuals." It also provides for the assessment of the personal estate of all corporations, liable to taxation on their capitals, in the town or ward where their principal place of business or office is located. And a special provision is made, in the last clause of this section, as to the place

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where the real as well as the personal estate of bridge, canal, and turnpike corporations shall be assessed. What is meant by the real estate of a corporation, and what by its personal estate, in this chapter of the revised statutes, is clearly defined by the second and third sections of the first title. (1 R. S. 387.) Its personal estate, as there defined, is *only that portion of its capital* which is not invested in real estate. But the capital of a corporation embraces the whole of its stock paid in or secured to be paid; whether it is invested in real or in personal property. The principle of the revised statutes, on the subject of the taxation of corporations, appears to be to tax the real estate, except as to canal, turnpike, and bridge companies, upon its actual *value*, and for the benefit of the inhabitants of the town and county where it is situated, in the same manner that the property of individuals is taxed; and to tax the residue of its capital, after deducting the *cost* of its real estate, as personal property, for the benefit of the inhabitants of the town and county where the financial concerns of the corporation are carried on.

To ascertain what the expression, *real estate liable to taxation*, in this sixth section of the second title of the tax law, means, we must examine other provisions contained in the same chapter. The first section of that chapter commences with a general declaration that all lands, and all personal estate, whether owned by individuals or corporations, shall be liable to taxation; subject to the exemptions thereafter specified. (1 R. S. 387.) And among the exemptions specified in the fourth section of the first title, is the real estate of colleges, academies, and seminaries of learning, and other literary and charitable corporations therein mentioned; and also the *personal* estate of every incorporated company, not made liable to taxation upon its capital by the fourth title of that chapter. None of these exemptions embrace the real estate of joint stock corporations, which derive a profit or income from their capitals, or otherwise. And upon this, the counsel for the appellants insist that the ninth section of the fourth title of this chapter of the revised statutes, could not have been intended by the legislature to exempt the *real estate* of such corporations from taxation, although they derived

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no profits or income whatever from their real or personal estates. I have also endeavored to bring my mind to the same conclusion. And I regret that I have not been able to do so. For I cannot discover any principle of justice or equity which should exempt from taxation, the unproductive property of stockholders in a joint stock corporation that is not equally applicable to the unproductive real or personal estate which the same persons, or others, may hold in their own names as individuals. Why the revisers extended the exemption from taxation in certain cases to all corporations, which by the previous law was confined to a very few that were then deemed favorites of the public, is not explained in the notes to their report. But that they had thus extended such exemption was distinctly stated in the note to the ninth section of the fourth title; in which section that exemption is found. The legislature, therefore, adopted this change in the law with a full knowledge of the fact that such a change was intended to be made. And the directions of that section are so plain and positive that I cannot doubt that the legislature, as well as the revisers, must have intended to exempt the real as well as the personal estate of the corporation from taxation; provided a satisfactory affidavit was presented to the board of supervisors of the county in which such property was assessed, showing that the company was not in the receipt of any income or profits whatever, either from its real or its personal estate. For the section expressly directs, that if such affidavit is made and filed, with the clerk of the board, within the time prescribed, *the name of the corporation shall be stricken out of the assessment roll, and no tax shall be imposed upon it.* This direction to strike the name of the corporation from the assessment roll, when taken in connection with the sixth and seventh sections of that title, appears to render it impossible for the board of supervisors to tax either its real or personal estate; unless they wholly disregard the positive injunctions of the statute. For the sixth and seventh sections require the name of the corporation to be inserted in the first column of the assessment roll; its real estate situated in the town or ward in which the assessment is made, in the second column; the actual value of such real estate in

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the third column ; and the part of its capital which is liable to taxation as personal property, in the fourth column. And if the name of the corporation is stricken from the first column, neither the value of the real estate as specified in the third, nor the part of its capital which is assessed as personal estate and set down in the fourth column, can be taxed to the corporation. Hence the board of supervisors, in the present case, found it necessary, in order to carry into effect their construction of the statute, to disobey the direction of the legislature to strike the name of the corporation from the assessment roll.

I have not, in the examination of this case, had access to the report of the judiciary committee of the senate, or the report of the former attorney general upon this question, in the case of the Black River Cotton and Woollen Manufacturing Company. But in reference to the act for the relief of that company, it is sufficient to say, the corporation had not taken the necessary steps to entitle it to exemption, either as to its real or personal property. And as there was neither justice nor equity in the principle which would have exempted any of the property of the corporation from taxation, when property of the same kind belonging to individuals was made to bear its portion of the public burthens, the legislature had a perfect right to refuse to exempt the real estate ; and would have done better justice if it had also refused to exempt the personal estate. For manufacturing companies are not taxed upon the nominal amount of their capitals paid in, but only upon the actual value of their real and personal estates. (1 R. S. 416, § 6, 7.) And the persons who own stock in such corporations are not taxable as individuals for the value of the stock held by them. (*Idem*, 388, § 7.) It may also be proper to say, that upon the construction which was put upon the section of the revised statutes now under consideration, in the recent case of *The People v. The Supervisors of Niagara*, (4 Hill's Rep. 20,) probably very few, if any, of these manufacturing companies were entitled to any exemption from taxation, except the right to commute for five per cent. upon their net income. For most of them have real estate which must produce some rent or income to the corpora-

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tion, even if the company is not engaged in manufacturing. And to render the affidavit satisfactory to the board of supervisors, they should require it to be so drawn as to leave no doubt upon their minds that the real, as well as the personal estate of the company, is wholly unproductive; so that it yields neither rents nor income, which can be received by the corporation or its agents.

In the present case, the bill avers that the affidavit produced was satisfactory to the board; and that no objection was made either to its form or its sufficiency. The language of the affidavit is as broad as the provision of the statute, and upon this demurrer to the bill, I am bound to presume the supervisors were satisfied the corporation had received no rents or profits from its real estate, nor any income from its personal property, within the year. And if they supposed the deponent had mistaken the law or the facts, in making the affidavit, they should have suggested it at the time; so that the matter might be explained by a supplemental affidavit. The conclusion at which I have arrived, therefore, is that the board of supervisors erred in refusing to strike the name of the corporation from the assessment roll, and in imposing a tax upon any part of its property.

No question was raised by the counsel for the defendants as to the jurisdiction of the court. I have not, therefore, considered the question whether this is a proper case of equitable cognizance, or whether the complainants had a perfect remedy at law, by mandamus, to compel the supervisors to strike the name of the corporation from the assessment roll.

**The decretal order appealed from must be affirmed with costs**

PEW and others *vs.* HASTINGS, ex'r, &c.

A surrogate has the power to open a decree taken by default, and in consequence of a mistake, or an accident.

Such a power is absolutely essential to the due administration of justice.

THIS was an appeal from a decision of the surrogate of the county of Washington. The appellants, as legatees under the will of Anna Hastings, deceased, cited the appellant, as her executor, to account. The executor, wishing for a final account, obtained the usual citation for all persons interested to attend the settlement of his account; and the proceedings were adjourned to the 25th of August. But the proctor for the legatees, by mistake, entered the adjournment in his register as having been to the 27th of August, and wrote to their counsel, who resided at Utica, that the hearing was to be had on the last mentioned day; and neither the proctor or counsel, or their clients, were aware of the mistake until the 26th of August. On that day the counsel arrived at Salem, where the hearing before the surrogate was to have taken place. And he then learned that the account had been settled before the surrogate, *ex parte*, the day before; but that the sentence, or decree, of the surrogate had not yet been drawn up and entered. He thereupon applied to the executor, and to his counsel, and informed them of the mistake, and requested them to consent that the default might be opened, and that his clients might have an opportunity to be heard; but they declined doing so. He also applied to the surrogate to allow him to appear and oppose the allowance and settlement of the account. But the surrogate did not feel authorized to do so; and before regular notice of an application for that purpose could be given to the adverse party, the surrogate had entered the sentence, or decree, upon the final settlement of the account of the executor, in the minutes of the court, as of the 25th of August. As soon as the necessary papers could be prepared and served, the appellants gave notice of an application to open their default and the sentence and decree founded thereon, and that they might be permitted to come in and contest the accounts. Upon the hear

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ing of that application, it was denied by the surrogate ; on the ground that he had no jurisdiction, or right, to open a regular order, or decree, made upon a default before him, and to let the parties in to be heard upon the merits. From that decision the legatees appealed.

*Ward Hunt*, for the appellants.

*C. Stevens*, for the respondent.

THE CHANCELLOR. The affidavits and account which were before the surrogate, upon this application, render it highly probable that great injustice will be done to the appellants if they are deprived of an opportunity to be heard upon the settlement of the account of the executor. The fact that the whole amount of the bond and mortgage, with interest thereon, was inventoried as due in July, 1843, when, if the account claimed by the father of the executor is correct, the executor must have known there was nothing whatever due upon the bond and mortgage at that time, renders it probable that the whole of that account was not justly due. Besides, this account does not appear to have been presented by the father to his son, or sworn to, until about the time these proceedings were instituted ; and more than six years after the death of the testatrix, and eleven years after some part of the account is stated to have accrued. It was not a case to be disposed of on the mere ex parte affidavit of the father, not only as to the fact of the services having been performed for the testatrix, but also as to the correctness of the valuation which he had made of such services. The only real question in this case then is, whether the surrogate had the power to open the default, and let the appellants in to contest the account of the executor, and give them an opportunity to show that the allowance of the account of the father was improper and collusive.

The practice of the surrogates' courts was originally derived from the practice of the ecclesiastical courts of England, in testamentary matters ; which courts there have the ordinary inci-

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dental powers of the court of chancery, and of the courts of common law, in regulating the proceedings before them, so as to prevent a failure of justice in consequence of mistakes and accidents which human foresight is not always able to guard against. (*Shanessy v. Allen*, 1 *Lee's Eccl. Rep.* 9. *Cargill v. Spence*, 3 *Hagg. Eccl. Rep.* 146.) The revisers, however, attempted to regulate the practice in surrogates' courts entirely by statute. The revised statutes, accordingly, after stating the general powers and jurisdiction of the surrogates, contained this provision: "which powers shall be exercised in the cases and in the manner prescribed in the statutes of this state, *and in no other; and no surrogate shall, under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state.*" (2 *R. S.* 221, § 1.) It was afterwards found, however, that the exercise of certain incidental powers by courts was absolutely essential to the due administration of justice; and that the revisers and the legislature had not, by their care and foresight, been able to take the case of these surrogates' courts out of the operation of the general rule. So much of the provision of the revised statutes above referred to, therefore, as restricted the power of the surrogates, and deprived them of the right to exercise such powers as were incidental to other courts, were subsequently repealed. (*Laws of 1837*, p. 536, § 71.)

The question here is not whether a surrogate, who has heard and decided a case upon the merits, has the power to grant a rehearing, so as to give one of the parties the benefit of a reargument, or the right to bring forward new evidence to sustain his side of the case, but whether he has the power to open a decree taken by default, in consequence of a mistake or accident by which one of the parties has been deprived of any hearing whatever. This last power is one which is absolutely essential to the due administration of justice; as defaults of the kind referred to must frequently occur where no human foresight could have anticipated and guarded against the event by which the default was occasioned. I think, therefore, the surrogate erred,



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in this case, in supposing that he had not the power to open the decree which had been taken by default.

The order of the surrogate which is appealed from, is reversed; and his sentence or decree settling the account of the respondent must be opened, or vacated. The proceedings must be remitted to the surrogate, with directions to assign a time for the parties to be heard before him by their counsel, and to produce their testimony; and that he require such notice of the time and place of hearing to be given by the proctor of the appellants, to the respondent or his proctor.

If the respondent had consented to waive the default, upon being informed of the mistake which had occurred, he would have been entitled to the costs which had been incurred in consequence of such default. But under the circumstances of this case I shall not give costs to either party, as against the other, either upon the application to the surrogate, or on the appeal from his decision upon that application.(a)

(a) Affirmed on appeal to the court for the correction of errors, December, 1846.

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 MCCARTEE, administrator. &c. vs. CAMEL.

[Distinguished, 4 Redf. 382. Followed, 25 Hun 484.]

Where one of the next of kin of the decedent, and who was entitled to a distributive share of his estate, left her domicile of origin, in the city of New-York, and went to reside at a place near the city of Baltimore, and continued to correspond with her mother and sisters in the city of New-York, but had not answered their letters for about twelve years previous to the death of the decedent, but there was nothing else to raise a legal presumption of her death; *Held*, that the administrator of the decedent was not justified in paying the share of the estate belonging to the absentee, to her sisters, without making inquiries at the last known place of residence of the absentee, to ascertain whether she was living or dead.

Where a person has not been heard from in seven years, and when last heard from he was beyond sea, without having any known residence abroad, the legal presumption is that he is dead.

This presumption has been adopted by analogy to certain provisions of the revised statutes, particularly the sections relative to the presumption of the death of persons upon whose lives estates in lands depend, where such persons have remained

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beyond sea, or absented themselves, in this state or elsewhere, for seven years together.

But the only presumption arising from such a protracted absence is, that the absentee is dead, if he has not been heard from within the seven years; not that he died at any particular time within the seven years, or even on the last day of that term. Even where a person whose existence is in question has remained beyond sea for seven years, if he had a known and fixed place of residence in a foreign country when he was last heard from, he ought not to be presumed to be dead, without some evidence of inquiries having been made for him, at such known place of residence, and without success.

Where the person, whose death is to be presumed, is in fact within the United States, and not technically beyond sea, absenting himself *in this state or elsewhere*, as used in the statute, means absenting himself from his last place of residence, in this state or in the United States, which was known to his family or his relatives. The mere fact that a person has absented himself from the place of his birth, or from his original domicile, for more than seven years, does not raise a presumption that he is dead.

In analogy to the statute of limitations, suits by creditors, legatees or distributees, before a surrogate, to obtain payment of their debts or legacies, or distributive shares, should be instituted within the time in which suits of the same character are required to be commenced in the courts of common law or of equity.

In cases where the courts of common law, the court of chancery, and the surrogate's court, have concurrent jurisdiction, a suit before the surrogate must be brought within the time limited by the revised statutes for commencing the suit at law, or in chancery. But in cases in which the court of chancery and the surrogate's court alone have concurrent jurisdiction, the suit before the surrogate should be instituted within the time prescribed for the commencement of suits of the same character in equity in cases where the subject matter of the suit is not cognizable by the courts of common law.

THIS was an appeal, by R. McCartee, the administrator of the estate of Sarah Brown deceased, from a decree of the surrogate of the city and county of New-York, directing the appellant to pay to Catharine Camel, the respondent, her distributive share of the estate of the decedent. S. Brown died in New-York in 1832, and letters of administration upon the estate were granted in August of that year. The persons who at the time of her death were entitled to distributive shares of her estate, were the children of a deceased sister, and the children of her deceased half-brother R. McDowell. At the time of the death of R. McDowell, which was long before the death of S. Brown, he had one son, Robert N. McDowell, and three daughters, Catharine, the respondent in this case, Margaret, and Ellen Ann, now the

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wife of G. C. Hubbard. R. N. McDowell left his residence in New-York twenty-six or twenty-seven years previous to the hearing before the surrogate, and went to sea. And he was last heard of in the summer of 1830, as having sailed from some port in South America. Catharine, the respondent, who was then unmarried, left the residence of her mother in New-York, in 1813, with a family who were removing to Maryland; and when next heard of, about seven years afterwards, was residing in the neighborhood of Baltimore, and was still unmarried. At that time several letters passed between her and her friends in the city of New-York; her mother and two sisters, together with an illegitimate son, continuing to reside at the latter place. After that, she was not heard of by her relatives in New-York for about fourteen years. And although they several times wrote letters to her, directed to her last known place of residence, they received no answers; from which circumstance they supposed her to be dead, until after the administrator had made a distribution of the property of the intestate between the other two daughters of R. McDowell, as being entitled to the one half thereof, and the children of his deceased sister as being entitled to the other half. In the latter part of 1834, or the beginning of 1835, her relatives in New-York heard she was still living, at a place called Never Die, in the vicinity of Baltimore; and her son and one of her sisters went there and found her. And it then turned out that she was living there at the death of S. Brown, the intestate, and was then a widow. Her brother-in-law shortly afterwards sent money to her to enable her to return to her friends in New-York. She accordingly returned there in 1835, and was then informed that her distributive share of the estate of her deceased aunt had been paid over by the administrator to her two sisters, under the supposition that she was dead.

In February, 1844, she presented her petition to the surrogate, claiming one third of one half of the personal property of the intestate, and praying that the administrator might render an account; and that he should be decreed to pay her the amount which might be found due for her distributive share of the estate, with interest thereon. The parties appeared before the surrogate,

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upon the return of the citation ; and the administrator filed his account ; in which account it was stated that the one half of the estate had been paid over to the two sisters of the petitioner, who were supposed to be the sole surviving children and representatives of the half brother of the intestate. The account was verified in the usual manner, and its correctness was not contested. And without putting in any answer whatever to that part of the petition which prayed for a decree for the payment of the distributive share of the petitioner, the parties proceeded to take testimony as to various matters which were afterwards set up as a bar to such a decree.

*S. J. Wilkin*, for appellant. The respondent having been absent, and not heard from, for more than seven continuous years previous to the distribution of the personal estate of Sarah Brown, the law presumed her, at the time of the distribution, to be dead. (*Loring v. Steinman*, 1 *Metc.* 204. *King v. Paddock*, 18 *John.* 141. *Doe v. Jesson*, 6 *East*, 80. *Jackson v. Boneham*, 15 *John.* 226. *Hopewell v. De Pinna*, 2 *Camp.* 113.) In *Doe v. Jesson*, where it was proved that a person went to sea at a particular time, which was the last account given of him, his death was presumed at the end of seven years from that time. And in *Hopewell v. De Pinna*, where the defendant pleaded coverture in bar of an action of assumpsit, and proved her marriage, and that her husband went abroad twelve years before the commencement of the action, this was held not to be sufficient ; and the defendant was required to prove that her husband was alive within seven years. Where no account can be given of the person, the presumption of the duration of life ceases at the expiration of seven years from the time when he was last known to be living, (1 *Phil. Ev.* 197,) a period which has been fixed from analogy to the statute of bigamy, and the statute concerning leases determinable on lives. (*Idem*, per *Spencer*, *Ch. J.*, 18 *John.* 143.) For the provisions of the revised statutes of this state respecting bigamy, see 2 *R. S.* 687. The section relative to the presumption of death of the person upon whose life estates depend, is as follows. If any person, upon whose life an estate

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in lands or tenements shall depend, shall remain beyond sea, or shall absent himself, in this state or elsewhere, for seven years together, such person shall be accounted naturally dead, in any action concerning such lands or tenements, in which his death shall come in question; unless sufficient proof be made in such case, of the life of such person. (1 R. S. 749.) In *Jackson v. Boneham*, (15 John. 227,) the death of a person was proved by hearsay in the family. On proceedings before the surrogate to distribute the personal estate of Sarah Brown, the surrogate, on the legal presumption of the death of Catharine Camel, would have ordered the distribution of her share of the estate amongst her next of kin. (2 R. S. 2d ed. 35, § 75, sub. 5.) If the appellant, as administrator, distributed the estate in the same manner that it would have been distributed by the surrogate, on formal proceedings for that purpose, before him, the distribution should be held valid, and should discharge the administrator. (*Lee v. Brown*, 4 Ves. Jun. 369. *Howe v. Earl of Dartmouth*, 7 Id. 150.) The funds in the hands of the appellant, as administrator, to be distributed, were properly paid over to her sisters; there being no legitimate child of Catharine Camel to represent her. And the releases produced by the appellant, before the surrogate, ought to have been deemed valid discharges as against the respondent. (4 Ves. 369. 7 Id. 150. 2 R. S. 35, § 75, sub. 5.) The respondent, if she had any legal or equitable claim against the appellant, on her return to the city of New-York, cannot now enforce it: 1. Because of the length of time she had suffered to elapse after being informed of the distribution of the estate, before calling on the administrator for her share. (*Dagley v. Tolferry*, 1 P. Wms. 285. *Phillips v. Paget*, 2 Atk. 81. *Cooper v. Thornton*, 3 Bro. C. C. 96, 186.) It will be perceived, on examining the cases upon several of the above heads, that no certain time is given within which the presumptive bar, release, waiver, or abandonment shall arise. And that the only criteria of fatal laches are, the nature of the demand, and the inconvenience, public or private, of allowing it to be enforced against the opposite party, at a remote period. Thus, in matters of election

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and specific execution, great promptness and diligence are demanded. Creditors and next of kin permitting an erroneous distribution to take place, stand upon much the same ground. But where no striking argument of inconvenience arises, the courts are warranted in allowing a time corresponding to the statute of limitations, viz. six years as to personal, and twenty years as to real estate. 2. The respondent substituted Mr. Hubbard, and her sister Margaret McDowell in the place of the appellant, as the persons from whom she was to receive her distributive share; portions of which she did receive. Whereby the appellant was induced to neglect the means of regaining the funds, if required so to do, from those to whom the share had been paid. The respondent might have maintained an action at law for the recovery of her distributive share. And eight years having elapsed, after her knowledge of the distribution of the fund, before any demand was made, her claim is barred. (2 R. S. 114, § 9. *Kane v. Bloodgood*, 7 John. Ch. Rep. 90. *Souzer v. De Meyer*, 2 Paige, 574.) Or if no action at law could have been sustained, 10 years had elapsed after she was entitled to file a bill in equity for her distributive share of the estate, and her remedy is therefore barred, by the provisions of the revised statutes on that subject. (2 R. S. 301, § 52.) The respondent should have produced proof of the death of her husband, to entitle her to proceed in her own name. If wrong in all the foregoing positions, we submit that, under the circumstances of the case, the appellant is not chargeable with interest and costs. (See cases above referred to.) The respondent had a remedy against Hubbard, and Margaret McDowell, which she ought to have pursued. The decree is also erroneous in not crediting the appellant with the sums paid to the respondent at various times, by Hubbard and M. McDowell, on account of her distributive share.

*E. W. Chester*, for respondent. The matters brought in issue, and to be decided by the chancellor, as made by the petition of appeal and answer, are, 1st. As respects the objection made by the appellant that the respondent had not shown that

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she was a widow, and as such entitled to institute the proceedings in this cause before the surrogate. We insist that it was not necessary she should be a widow to entitle her to institute such proceedings. If it is intended by this objection to claim that she was a feme covert, that was an affirmative for the appellant to maintain, and it should have been urged at the outset, in abatement. It was only spoken of on summing up before the surrogate. No objection of the kind appears in the return of the surrogate. 2d. The petition of appeal states the absence of respondent from the city of New-York without having been heard from for about 14 years. From which absence, the appellant claims that there was a legal presumption of her death, and that he was justified in paying over the proceeds of the estate to the distributees residing in the city of New-York. New-York was not her place of residence, and no presumption arises from the fact that her relations in New-York had not heard from her. She had a well known and well defined place of residence in Baltimore county, Md. where inquiries should have been made for her, and which, if made, would have been successful. 3d. It is urged by the appellant that the respondent consented that her portion of the estate should remain with her sisters; saying that she would look to them for it and not trouble appellant. The proofs do not show this. They show that a deception was practised on the respondent, by a representation that the money was in the hands of her son, and she, supposing this to be true, expressed her satisfaction. No agreement of the kind mentioned is proved. She could never have maintained a suit against them. The appellant denied his being liable to her, and attempted to get a release, without any consideration. 4th. The appellant is to be confined to the allegations in the petition of appeal as to what was relied on and claimed to be proved before the surrogate. And he cannot raise any new defence here. The petition and answer make up the issue. The statute of limitations not having been relied upon below, must be excluded from consideration here. 5th. The appellant ought not to be excused from the payment of interest, and the decree of the surrogate was correct in allowing it; because there has been an evident intention to

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deceive and defraud the respondent; because the administrator might have recovered interest of Hubbard and McDowell; because during all this time the respondent has been unjustly deprived of the money rightfully due her. 6th. There is nothing in the nature and method of this defence, which ought to excuse the appellant from the payment of costs. 7th. Where any of the matters set up in defence depend on the credibility of the testimony, it is the province of the surrogate to judge of that credibility; and his conclusions therefrom stand like the conclusions of a jury, and ought not to be reversed by the appellate tribunal; except where they were clearly and obviously wrong.

THE CHANCELLOR. There is no doubt of the fact in this case, that the appellant paid over the one half of the intestate's estate to the two daughters of R. McDowell, in 1833, in good faith; supposing that their sister had died many years previous thereto without leaving legitimate issue. The presumption now is that the brother is dead; as he was beyond sea when he was last heard of in 1830, without having any known residence abroad; and no intelligence has been obtained respecting him since that time. This presumption is supposed to have been adopted by analogy to certain statutory provisions; particularly the provision of the statutes relative to the presumption of the death of persons upon whose lives estates in lands depend; where such persons have removed beyond sea, or absented themselves in this state, or elsewhere for seven years together. (1 R. S. 749, § 6. *Stat. 19 Charles 2d, ch. 6, § 2.*) But as he was heard of within two years previous to the death of S. Brown in 1832, there is no presumption that he was not alive at that time, so as to be entitled to a distributive share of her estate as one of the next of kin. The only presumption arising from such absence is that he is dead, if he has not been heard of within the seven years mentioned in the statute; not that he died at any particular time within the seven years, or even on the last day of that term. (*Doe ex dem. Knight v. Nepean*, 5 Barn. & Adol. 86; 2 Mees. & Wels. 894.) The surrogate was right therefore in not awarding to the respondent the fourth of the distributive



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share to which the brother was entitled if living at the death of the intestate ; without some evidence to establish the fact that he died before that time.

There was nothing upon which to found a legal presumption that the respondent was dead in 1832, or at the time when her distributive share was paid to the sisters in 1833 ; although her relatives in New-York had not then heard from her in twelve or thirteen years. Even where the person, whose existence is in question, has remained *beyond sea* for seven years, if he had a known and fixed residence in a foreign country when he was last heard from, he ought not, in justice, to be presumed dead, without some evidence of inquiries having been made for him at such known place of residence, without success. For the average duration of life of persons under sixty years of age is more than twice seven years. And in the present state of society, in this and other commercial countries, no presumption of the death of an individual does in fact arise from the mere circumstance that he has fixed his domicile abroad, and has not been heard of at the place of his birth, or of his original residence, for more than seven years. And if the law raises a presumption from that circumstance alone, by analogy to the statutory provision before referred to, still it does not apply to the case of this respondent. For she was not *beyond sea*, nor had she absented herself in this state, or elsewhere, for seven years previous to the death of the intestate ; within the intent and meaning of the statute before referred to.

Where the person whose death is to be presumed, is in fact within the United States, and not technically *beyond sea*, "absenting himself *in this state or elsewhere*" must mean absenting himself from his last place of residence in this state, or in the United States, which was known to his family, or his relatives who would be likely to know whether he was living ; and from whom a party in the search of the truth would be likely to make inquiries. The mere fact, therefore, that the party has absented himself from the place of his birth, or from his original domicile, for more than seven years, does not raise a presumption that he is dead. Here the respondent had a mother and two

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sisters, and also a natural son, residing in New-York ; all of whom must have been known to the administrator. And they were undoubtedly aware of the fact that she was residing at Never Die in the vicinity of Baltimore, about twelve years before. If the administrator had made the proper inquiries, he would also have ascertained that fact. And having done that, he should have caused inquiries to be made at such last known place of her residence ; for the purpose of ascertaining whether she still resided there, or was dead, or had removed to some other place which could be ascertained. Or, if he did not wish to incur the expense of making such inquiries, he should have applied to the surrogate for a final settlement of his account, and the distribution of the fund in his hands to such persons as should come in and establish their claims to the same as the next of kin of the intestate. Or he might have taken security from those to whom he paid the money, to refund her share, in case it should afterwards appear that she was alive at the death of her aunt. The administrator probably acted upon the presumption that she was dead, because the letters written to her some ten or twelve years before remained unanswered. But it was almost as unsafe to rely upon that circumstance alone, as evidence of her death, as it would have been to presume from the name of her last known place of residence that she would live beyond the usual period of human life. The more rational presumption was that she had gone to some other place, and that the letters written to her had not reached her. For if she had died there, she probably would, previous to her death, have informed some of her acquaintances that she had a mother and other relatives living in New-York, and that the fact of her death would have been communicated to them by letter. The administrator, therefore, is not entitled to protection on the ground that he was legally authorized to presume the respondent was dead at the time the succession opened in 1832.

Nor has there been such an assent or acquiescence on her part, since she was aware of the fact of the payment of her distributive share to her sisters, as in itself will constitute an equitable bar to her claim against the administrator. She did

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indeed say to him, as some of the witnesses state, that she was contented to have the money remain as it was. But what she said was founded upon the erroneous impression that the fund was in the hands of her son, for her benefit; which false impression was caused by what was said by one of the sisters at that time. And that the administrator did not rely upon that declaration, as an absolute relinquishment of her claim upon him, is established by the fact that he shortly afterwards attempted to obtain a relinquishment of that claim.

The only remaining questions to be considered are, whether her claim was barred by the statute of limitations; and whether the administrator could avail himself of that defence before the surrogate. As the appellant was not called upon to state his defence, against her claim to a decree for the payment of her distributive share, before the taking of the testimony of the witnesses, it would be wrong to deprive him of that defence, if the evidence showed that it actually existed, upon the technical ground that he had not formally pleaded it as a bar to such claim. It appears in this case that the administrator had received the avails of the property of the intestate, and had actually paid over the half thereof belonging to the children of R. McDowell, as early as June, 1833. The right of the respondent to sue the administrator in the court of chancery, if not in a court of common law, for the whole of her distributive share of the estate, therefore, accrued at the expiration of one year after the granting of letters of administration in August, 1832. (2 R. S. 114, § 9.) And her right to institute a suit before the surrogate, for the same purpose, accrued at the same time. (*Idem*, 116, § 18.) This suit was not commenced until 1844; more than ten years after the right accrued. The statute of limitations does not in terms specify the time within which a creditor, legatee, or distributee, shall institute a suit before the surrogate, against executors or administrators, to obtain payment of his debt or legacy, or his distributive share of the estate of the decedent. But the legislature never could have intended to give to a party the right to institute such a suit before a surrogate, after his remedy was barred by the statute of limitations

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in all other courts. Such a suit therefore, by analogy to the statute of limitations, should be instituted before the surrogate within the time in which suits of the same character are required to be commenced in the courts of common law, or of equity. If it is a case in which the courts of common law, the court of chancery, and the surrogate's court, have concurrent jurisdiction, the suit before the surrogate should be brought within the time limited by the revised statutes for commencing the suit at law, and in chancery. (2 R. S. 301, § 49.) But if it is a case where the court of chancery and the surrogate's court alone have concurrent jurisdiction, then the suit before the surrogate should be instituted within the time prescribed for the commencement of suits of the same character in equity; in cases where the subject matter of the suit is not cognizable by the courts of common law. (1 R. S. 302, §§ 51, 52, 53.)

The conclusion at which I have arrived in this case, therefore, is, that the right of the respondent to recover from the administrator any and every part of her distributive share of the estate of S. Brown, in any of the courts of this state, was barred by the statute of limitations at the time she presented her petition to the surrogate, in January or February, 1844. The sentence or decree which is appealed from, must then be reversed. But as this is a new question, arising for the first time under the provisions of the revised statutes, I shall not charge the respondents with costs upon this appeal; nor with the costs of the administrator upon the proceedings before the surrogate.

## CASSIDY vs. CASSIDY and others.

The court of chancery has no jurisdiction, upon petition, to order a portion of a fund in court arising from the sale of real estate in a partition suit, which portion belongs to an adult heir of a deceased party to such suit, to be paid out to the creditors of the decedent.

Heirs, who are liable to creditors of their ancestor in consequence of lands having descended to them, must be sued jointly, for such liability, and not separately.

Where there is a fund in court belonging to infants, the chancellor, as the guardian and protector of their rights, may, in his discretion, upon a summary application, order it to be applied for the payment of any just claim against the infants. Or, if the claim is contested, or is doubtful, he may require the claimant to establish his right by suit against the infants; or upon a reference to a master.

But where an adult heir, whose share of a fund is in court, as well as the infant heirs, is liable to contribute towards the payment of the debts of the ancestor, the creditors should be left to proceed in the usual way, by suit against all of the heirs jointly.

THIS was an application by creditors of P. Cassidy, who died in 1835, for the payment of their several debts, out of moneys in court; which moneys arose from the sale of real estate in a partition suit, between the heirs of the decedent, in 1839. Four of the adult heirs had received their several shares of the proceeds of the sale. And the moneys still remaining in court belonged to Mary Cassidy, one of the heirs, who had arrived at the age of twenty-one, and to others who were still minors.

*P. Gansevoort*, for the petitioners.

*N. Hill Jr.*, for M. Cassidy and the minor heirs.

THE CHANCELLOR. The objection, by Mary Cassidy, that this court has not jurisdiction, upon petition, to order that part of the fund in court which belongs to her, to be paid out to the creditors of the decedent, appears to be well taken. These creditors were not parties to the partition suit, which terminated more than six years prior to the presenting this petition. And she has the right to insist that the portion of the fund in court, which was invested for her use under the decree, belongs to her; and that the creditors, if their claims are not barred by lapse of

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Cassidy v Cassidy.

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time, shall proceed against her by suit; in the same manner as if she had sold her undivided share of the real estate, and had invested the proceeds thereof herself. The article of the revised statutes relative to suits by and against legatees, and against the next of kin, heirs and devisees, (2 R. S. 450,) prescribes the course of proceeding to charge the several heirs with their proportions of the debts of the decedent, and states what the creditor must show to entitle him to succeed in his suit against such heirs. And the seventy-third section of the act of May, 1837, requires all the heirs, who are liable to a creditor of the decedent in consequence of lands having descended to them, to be sued in a court of law or of equity, for such liability, jointly and not separately. (*Laws of 1837, p. 537.*)

Where there is a fund in court belonging to infants, the chancellor, as the guardian and protector of their rights, may in his discretion, upon a summary application, order it to be applied for the payment of any just claim against the infants; to save the expense of useless litigation. Or if the claim is contested, or is doubtful, he may require the claimant to establish his right by suit against the infants in the usual way, or upon reference to a master; as may be deemed most beneficial to the interest of the infants, with reference to the probable expense of the litigation or otherwise. In the present case, therefore, if the infants were alone liable for the debts of the petitioner, it might be proper, and would probably save expense, to direct a reference to a master to inquire and report whether they were liable for the claims of the creditors, and how much, if any thing, they were liable to contribute towards the payment of such claims; allowing their guardian ad litem to insist upon the statute of limitations, or any other defence which he might deem advisable to set up, before the master on such reference. But as the adult heir whose fund is in court in this case, as well as the four whose shares of the proceeds of the real estate have already been paid to them, is liable to contribute towards the payment of the claims of the petitioner if any thing is due thereon, the petitioners should be left to proceed in the usual way; by a suit or suits, at law or in equity, against all of the heirs jointly.

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The injunction which was erroneously granted upon this petition, must, therefore, be dissolved, and the petition must be dismissed with \$8 costs. But it is to be dismissed without prejudice to the rights of any of the petitioners to proceed by suit, in equity or at law as they may be advised; and to apply for an injunction in such suit, if they shall deem themselves entitled to such injunction, against all or any of the defendants therein

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WESTERVELT, ex'r, &c. vs. GREGG.

[Applied, 2 Barb. Ch. 475. Doubted, 70 N. Y. 1, 4. See 3 Redf. 533; 5 Id. 580.]

The *rendering* of an account to the surrogate, by an executor or administrator, and the *settlement* of that account after it has been rendered, are not one proceeding, though the latter frequently is a mere continuation of the former proceeding. The revised statutes authorize the surrogate, after the expiration of eighteen months, to make an order requiring the executor or administrator to render an account of his proceedings. And such order may be made upon the application of a person having a claim upon the estate of the decedent, either as creditor, legatee, or next of kin, or of any person in behalf of a minor having such a claim. Or, it may be made by the surrogate, by virtue of his office, and without any application on the part of those who are interested in the estate.

The statute also directs the manner of rendering such account; and authorizes the examination of the executor or administrator on oath. And when that is done it completes the *rendering* of the account, and terminates the proceeding; unless the executor or administrator has asked for a final settlement of the account; or some person interested in the estate has applied for the payment of his debt, or legacy, or distributive share.

Where an executor or administrator applies for a final settlement, the surrogate, after the account has been rendered, is authorized to adjust and settle the same. And for this purpose, any person interested in the estate may surcharge, or falsify the account; and witnesses may then be examined in relation to the matters in dispute between the parties. And in such cases, the surrogate may refer the accounts to an auditor, or auditors, to examine and report thereon.

Although the executor or administrator does not ask for a final settlement, by any proceeding on his part, the surrogate has power to decree the payment of debts, legacies, and distributive shares, out of the funds of the estate in the hands of the executor or administrator.

Where an application is made to the surrogate, by a creditor, or by a legatee who is entitled to a legacy of a specified amount, if the executor or administrator denies that the fund in his hands is sufficient to pay that and all other claims which are entitled to a preference, or to an equality in payment, the surrogate is authorized to adjust, or settle, the account of the executor or administrator; for the purpose of

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ascertaining whether the claimant is entitled to a decree for the payment of the whole of his debt, or legacy, or only of a part thereof.

Where the executor has not already rendered his account to the surrogate, a creditor, or legatee, who seeks for payment of his debt, or legacy, may, in his petition, ask for an account, and also for the payment of such debt, or legacy. And after the account has been rendered, if its correctness is disputed, the surrogate may proceed to settle the same, so far as concerns the rights of those parties, and may make his decree, as to the payment, accordingly.

A residuary legatee, or a person who is entitled to a distributive share, may also proceed in the same manner, to have the account of the executor or administrator liquidated and settled; so as to obtain his residuary or distributive share of the estate of the decedent.

But in either case, if the applicant, in his petition to the surrogate for an account, has not asked for the payment of his debt, or legacy, or distributive share, but merely that the executor may render an account, he must make a new, or further, application to the surrogate, stating the nature and extent of his own claim upon the fund, and his objections, if any, to the account rendered by the executor or administrator; and asking that the account may be settled and adjusted, and that he may be paid the amount of his claim, or so much thereof as he may be entitled to, out of the fund in the hands of such executor or administrator.

Where the petition, presented to a surrogate by a legatee, asked for no relief whatever except that the executor might be ordered to render an account according to law; *Held* that the surrogate having granted the prayer of the petition, his jurisdiction under that petition was exhausted; and that no settlement of the account of the executor could properly be directed, without the presenting of a new or farther petition, praying for the settlement and adjustment of the account, and the payment of the distributive share of the petitioner.

Where a distributive share of the estate of a decedent belongs to a married woman, the petition to the surrogate, asking for the payment of such distributive share, must be presented in the joint names of such married woman and her husband; and not in the name of the husband alone.

Upon proceedings before the surrogate, against an executor, to compel the rendering of an account by him, the executor should be permitted to verify his account by his oath: And, for the protection of the rights of others, the surrogate should in all cases require such account to be rendered on oath.

An executor or administrator may be examined on oath, upon the mere rendering of an account by him; but such examination must be before the surrogate himself. For he is only authorized to appoint an auditor, to examine and report upon the accounts, where there is to be a settlement of the accounts, either final or otherwise.

An application to the surrogate, by a creditor, legatee, or distributee, to compel the executor or administrator to pay the debt, legacy, or distributive share out of the fund in his hands, is not such a suit as will entitle the party proceeded against to security for costs, where the applicant is a non-resident.

The provisions of the revised statutes relative to security for costs, apply only to suits in courts of record, and are not applicable to proceedings before a surrogate.



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THIS case came before the chancellor upon an appeal by the acting executor of H. Westervelt, deceased, from two decisions and orders of the surrogate of the city and county of New-York. Gregg, the respondent, whose wife was a legatee of the testator, presented a petition to the surrogate, stating, among other things, that more than eighteen months had elapsed, and that no account had been rendered; and praying for an order of the surrogate requiring the executor to render an account according to law. An order was made accordingly; and the executor was duly cited to render his account. On the second of October, 1845, the executor rendered his account, pursuant to the order, and offered to verify the same by his oath; but the surrogate refused to permit him to verify the same, and the account was filed without oath. The surrogate inquired of the counsel for the petitioner whether the account would be contested by him; and being informed it would be so contested, the surrogate, without any application on the part of the petitioner, decided to refer the accounts to an auditor for examination. The counsel for the executor objected to the reference, on the ground that the counsel of Gregg had not stated any objections to the account. But the surrogate overruled the objection, and made an order referring the accounts to an auditor to examine, and to report his determination thereon upon a specified day; which day was also appointed for the hearing of the parties on the question as to the confirmation of the report of the auditor, and for further directions.

Immediately upon the making of that order, the executor presented to the surrogate an affidavit of the non-residence of Gregg, which fact was admitted by the counsel for the latter, and asked for an order for security for costs. That motion was denied. And from the order denying the same, and also from the order referring the account to the auditor, the executor appealed.

*O. L. Barbour*, for appellant. I. As respects the order appointing auditors. The proceedings before the surrogate were not of such a nature as to authorize him to refer the account of the executor to auditors. The revised statutes contain a section

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specifying the time and manner in which an executor or administrator may be required, by an order of the surrogate, to *render an account* of his proceedings. (2 R. S. 92, 2d ed. § 52.) The subsequent sections of the same article, down to § 60, direct as to the manner in which the account shall be rendered, the evidence of payments, the commissions of the executor, &c. Then the 60th section provides that if, upon being required by any surrogate to render an account, an executor or administrator desires to have the same *finally settled*, he may apply to the surrogate for a citation to the creditors, and next of kin of the deceased, and the legatees if there be any, to appear before him and to attend the *settlement* of such account. The succeeding sections specify what proceedings shall be had thereupon. The 64th section authorizes the hearing, of the allegations and proofs of the respective parties, to be adjourned from time to time. And it authorizes the surrogate to appoint one or more auditors to examine the accounts presented to him, and to make report thereon, subject to his confirmation, &c. This is the only section to be found in the revised statutes, which authorizes the appointment of auditors. And we insist it applies, not to the proceedings specified in the fore part of the article, for the rendering of an account by an executor, but to proceedings before the surrogate, under the 60th section, for the final settlement of the executor's account. The proceeding in this case was of the former description, and not for a final settlement. Consequently, the surrogate had no authority to refer the account to auditors. (See *Gardner v. Gardner*, 7 Paige, 112.)

The executor should have been allowed to verify his account, by his own oath. By the revised statutes, it is provided that an executor shall be allowed, on the settlement of his account, for any item of expenditure under twenty dollars, for which no voucher is produced, if the same be supported by his own oath. (2 R. S. 92, § 55.) The appellant, therefore, had an interest in having his account presented to the surrogate with such a verification. And if it was his right so to verify it, the refusal of his request was an injury to him.

The proceeding before the surrogate was not properly institu

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ted in the name of the respondent alone. It being an application on account of a distributive share which belonged to the wife of the petitioner, she should have joined in the petition.

II. As to the order refusing to require the respondent to give security for costs. The statute provides that when a suit shall be commenced in *any court* for a plaintiff not residing within the jurisdiction, &c., the defendant may require such plaintiff to file security for the payment of the costs that may be incurred by the defendant in such *suit* or *proceeding*. (2 R. S. 2d ed. 515, § 1.) We suppose this was substantially a suit, before the surrogate. The statute appears to contemplate a litigated proceeding before the surrogate, in which there is, in effect, a plaintiff and a defendant, and it specifies what evidence shall be admitted, and what allowances shall be made to the executor, and provides for enforcing obedience to the order of the surrogate. But if it should be deemed not to be a suit, it is at least a *proceeding*; and that, we submit, is sufficient, within the intent and language of the statute. There can be no doubt that the jurisdiction exercised by a surrogate, is in all cases, that of a court. The kind of court which is authorized to require the giving of security for costs, is not specified in the statute. It is not even required to be a court of record. Justices' courts, however, are provided for by another statute. (*Laws of 1831, p. 403, § 32; 2 R. S. 228, § 17.*)

*L. Livingston*, for respondent. I. Auditors may be appointed by the surrogate to examine accounts presented to him. (2 R. S. 34, 2d ed. § 64.) The statute does not prescribe any rules or regulations as to the time when the surrogate is to refer accounts to auditors; but leaves the same wholly in his discretion. The transcript shows that the accounts were to be contested. That was, in itself, a sufficient reason for the surrogate to refer them to an auditor. The surrogate has, in such matters, a right to regulate his own practice; and an appeal cannot be taken from the decision of the surrogate, upon a mere point of practice: unless he violates some provision of the statute. The refusal of the surrogate to swear *Westervelt* to the

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affidavit annexed to his account, was not a refusal to do any judicial act as surrogate. The affidavit could have been sworn to before any commissioner of deeds, and it was not necessary that the oath should be administered by the surrogate. The respondent had a right to examine the executor on oath touching his payments, and as to any property which had come to his hands, and the disposition thereof. (2 R. S. 2d ed 33, § 54.)

II. An application to a surrogate for an order to compel an executor to account, is not a *suit*, within the meaning of section one, title two, of chapter ten, of the third part of the revised statutes. (2 R. S. 515.) The executor was in default in not accounting within the time allowed by law, and could have been called to account by the surrogate, without any application by the respondent. (2 R. S. 32, § 52.) It was the duty of the executor to account, whether called upon or not. (2 R. S. 33, § 60.) The expenses of the accounting are to be paid out of the estate of the deceased. The reason alleged by the appellant why security for costs should be given, was that he might be compelled to appeal from some decision of the surrogate on the accounting. This was not a sufficient reason for requiring security to be given. The 5th section of the statute respecting security for costs, directs the bond to be filed with the clerk of the court, &c. This shows that the provisions of the revised statutes on the subject, were only intended to apply to courts of record. A surrogate's court is not a court of record, and it has no clerk. Consequently the proceeding to compel the giving of security for costs, cannot be resorted to there. The fee bill which regulates the amount of costs in the various courts of record, does not speak of the fees in surrogates' courts. It merely specifies the "fees of surrogates." (2 R. S. 646, § 33.) The surrogate is a special officer, possessing limited statutory powers.

*O. L. Barbour*, in reply. As respects the giving of security for costs, there is no difficulty in complying with the 5th section of the statute. The bond may be filed with the surrogate him

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self; who is the clerk of his own court. Thus, surrogates are required to provide seals for their courts, (2 R. S. 221, § 4, 5;) to issue subpoenas and attachments for witnesses, under their seal of office, to issue citations and attachments against parties, (*Idem*, § 6;) to provide and keep books of records &c., (*Idem*, 222, § 7.) And every surrogate is directed carefully to file and preserve all affidavits, petitions, reports, accounts, and all other papers belonging to his court. (*Idem*, 223, § 8.) He also has power to exemplify, under his seal of office, all transcripts of records, papers, or proceedings, &c. (*Idem*, 222, § 6, *sub.* 5.) And by another statute, the clerks of the supreme court, and the surrogates of the several counties, are authorized to make exemplified copies of any last will which shall have been proved in their respective courts, &c. (*Laws of 1837*, p. 536, § 68.) These several provisions of the statute show that the legislature had considered and treated the surrogate as the clerk of his own court. And it is a compliance with the statute to file the bond with the person who acts as clerk of the court in which the "suit or proceeding" is pending; whatever may be his name or title. If this were not so, there never could be any security for costs given in this court; because, although there is a register, and an assistant register of the court of chancery, there is no clerk, *eo nomine*. Again; if there is no clerk, with whom a bond can be filed, of course the plaintiff will be excused from filing it; but the want of a clerk should not excuse him from giving it. The defendant should not be prejudiced, merely because there happens to be no clerk. The tribunal is not one of his choosing. The provision of the statute before referred to, which requires the surrogate to file and preserve all papers belonging to his court, is certainly broad enough to justify the filing of a bond for costs with him. The objections to the bond are not to be filed with the clerk; but notice thereof is to be given to the plaintiff's attorney. (2 R. S. 620, § 5.)

The surrogate's court is a court of record. It has a judge; who occupies the place of judge of the old court of probates. It has a seal; (2 R. S. 221;) and as we have before insisted, it has a clerk, viz: the surrogate himself. It has also records.

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(*Idem*, 222, § 7.) The statute declares that "the surrogates' courts shall be at all times open." (*Idem*, 221, § 2.) See also *Id.* 221, § 5, and 223, § 12, where a "surrogate's court" is spoken of. The same phrase occurs in various other places. It is true, the fee bill does not mention surrogates' courts, as such, among the other courts of record. It merely prescribes the personal fees of the surrogate; and does not profess to embrace the fees of attorneys in that court. Hence it was not necessary to speak of the surrogate's court, as such.

THE CHANCELLOR. I think the surrogate erred in this case, in referring the account to an auditor for examination. For it does not appear that there was any proceeding before him which called for a final settlement of the account of the executor, or for a settlement or adjustment of the account even as between the parties to the proceedings before him. The *rendering* of an account, by an executor or administrator, and the *settlement* of that account after it has been rendered, are not one and the same proceeding, though the latter is frequently a mere continuation of the former proceeding. The 52d section of the article of the revised statutes relative to the duties of executors and administrators, in rendering an account and in making distribution to the next of kin, (2 R. S. 92,) authorizes the surrogate, after the expiration of eighteen months, to make an order requiring the executor or administrator to render an account of his proceedings. And such order may be made upon the application of a person having a claim upon the estate of the decedent, either as creditor, legatee, or next of kin, or by any person in behalf of a minor having such a claim; or it may be made by the surrogate, by virtue of his office, and without any application on the part of those who are interested in the estate. The 54th section of the same title directs the manner of rendering such account, and authorizes the examination of the executor or administrator upon oath, touching the payments stated in his account as having been made by him, and as to the property and effects of the deceased which have come to his hands, and the disposition thereof. That, however completes the *rendering* of the accounts. And

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it terminates the proceeding, unless the executor or administrator has asked for a final settlement of the account; or some person interested as a creditor, or legatee, or who is entitled to a distributive share of the estate, has applied for the payment of his debt, or legacy, or distributive share.

Where the executor or administrator applies for a final settlement, the surrogate, after the account has been rendered, is authorized to adjust and settle the account. And for this purpose any person interested in the estate may surcharge or falsify the account which has been rendered; and witnesses may then be examined in relation to the matters in dispute between the parties. In such cases also, the surrogate, in the exercise of a sound discretion in reference to the nature and extent of the questions in dispute between the parties, may refer the accounts, which have been presented to him, to an auditor or auditors, to examine and report thereon. (2 R. S. 93, § 60, 64, 70.)

There is another class of cases in which the surrogate is authorized to proceed and settle the account, after it has been rendered in the manner prescribed in the 54th section; although the executor or administrator does not ask to subject himself, or the estate which he represents, to the expense of a final settlement, by any proceeding on his part. The principal object of the proceeding against the executor or administrator, to compel him to render an account, is to enable those who are interested in the estate to ascertain the situation of the fund; and to enable them to obtain the payment of their debts, legacies, or distributive shares, out of such fund, by a decree of the surrogate or otherwise. The surrogate has power to decree the payment of debts, legacies, and distributive shares, out of the funds of the estate in the hands of the executor or administrator. (2 R. S. 116, § 18.) Where an application, therefore, is made to the surrogate, by a creditor, or by a legatee who is entitled to a legacy of a specified amount, if the executor or administrator denies that the fund in his hands is sufficient to pay that and all other claims which are entitled to a preference, or to an equality in payment, the surrogate will be authorized to adjust or settle the account of the executor or administrator; for the purpose of as-

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certaining whether the claimant is entitled to a decree for the payment of his debt, or legacy, or any part thereof. The petitioner, therefore, if the executor, has not already rendered his account to the surrogate, may in his petition ask for such account, and also for the payment of his debt or legacy. And after the account has been rendered, the surrogate may, if its correctness is disputed, proceed to settle the same, so far as concerns the rights of those parties; and may make his decree as to the payment accordingly. A residuary legatee, or a person who is entitled to a distributive share, may also proceed in the same manner, to have the account of the executor or administrator liquidated and settled, so as to obtain his residuary or distributive share of the estate of the decedent. But in either case, if the applicant, in his petition to the surrogate for an account, has not asked for the payment of his debt, or legacy, or distributive share, but merely that the executor may render an account, as in the present case, he must make a new or further application to the surrogate; stating the nature and extent of his own claim upon the fund, and his objections, if any, to the account rendered by the executor or administrator, and asking that the account may be settled and adjusted, and that he may be paid the amount of his claim, or so much thereof as he may be entitled to, out of the fund in the hands of such executor or administrator.

The petition presented to the surrogate in this case, asked no relief whatever, either general or specific, except that the executor might be ordered to render an account according to law. And that prayer having been fully complied with, the jurisdiction of the surrogate under the same was exhausted. No settlement of the account, therefore, could properly be made, without presenting a new petition for the settlement and adjustment of the account, and the payment of the distributive share of the wife of the petitioner. It may also be proper to observe that as the distributive share belonged to the petitioner's wife, and not to him, the petition should have been in their joint names; so that the accounting would have been binding upon her as well as her husband; and so that the proceedings could have been continued in her name if her husband had happened to die be



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fore the final decree. That, however, was a mere technical objection, which was not made before the surrogate.

I think the surrogate also erred in refusing to permit the executor to verify his accounts in the usual form by oath. The statute makes the oath of the executor evidence in his own favor, as to certain small items of disbursement, and to a limited amount. Beyond those, the oath of the executor to the correctness of the account would not have been evidence in his own favor. But for the protection of the rights of parties interested in the estate as creditors or legatees, the surrogate should in all cases require the account to be rendered on oath.

The estates of deceased persons should not be subjected to the useless expense of producing evidence to prove items in the account of the executor or administrator, when the correctness of those items is not in fact doubted by the adverse parties. The surrogate, upon the settlement and adjustment of the account, therefore, should call upon the party contesting the account to state what items thereof are admitted, and what are intended to be contested, before proceeding to hear the testimony in relation thereto; but with liberty to add to the objections, if upon the examination of the executor or administrator upon oath, or otherwise, it should be discovered that other charges or credits are erroneous. And where the account is referred to an auditor, he should be required to proceed in the same manner. The costs of the accounting being in the discretion of the surrogate, if the party contesting the account subjects the accounting party to useless expense, by unfounded objections, he may be properly charged with costs personally.

The order of the surrogate, referring the accounts to the auditor, not being founded upon any proper application before him for the *settlement* of the account, or upon any proceedings which required a settlement and adjustment of the accounts as between these parties, that order was erroneous and must be reversed. The statute authorizes the examination of the executor on oath upon the mere rendering of an account. But in that case, the examination must be before the surrogate himself; as he is only authorized to appoint an auditor to examine and report upon the

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accounts where there is to be a settlement thereof. The reversal of the order of reference is to be without prejudice to the right of the respondent and his wife, to apply to the surrogate for the payment of her proportion of the estate of the testator, if the same has become due and payable, according to the terms of the will; and to settle the account of the executor so far as may be necessary to ascertain the amount which is to be paid.

The proceedings before the surrogate upon rendering the account being at an end, by this reversal of the order of reference to the auditor, the application for security for costs necessarily falls with it. It may be proper for me to say, however, that I have examined the question, presented by that part of the appeal, and have arrived at the conclusion that an application to the surrogate by a creditor, legatee, or distributee of the testator or intestate, to compel the executor or administrator to pay a debt, legacy, or distributive share out of the fund in his hands, is not such a suit as will entitle the party proceeded against to security for costs where the applicant is a non-resident. Although such a proceeding may properly be denominated a suit in the surrogate's court, so as to bring it within the language of the first section of the title of the revised statutes relative to security for the payment of costs, (2 R. S. 620,) the other provisions of that title are such as to satisfy me that the first section, as well as the others, was only intended to apply to suits in courts of record.

Neither party is to have costs as against the other upon the appeal.

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KETCHUM and others vs. DURKEE and others.

Upon the dissolution of a copartnership by the death or bankruptcy of one or both of the copartners, the creditors of the firm obtain a quasi lien upon its property and effects; which the court of chancery may work out for them, in administering the equities between the copartners or their representatives.

But where there has been a bona fide sale of the copartnership effects from one partner to another, upon the voluntary dissolution of a solvent firm, and without

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reserving any lien thereon for any purpose, the creditors of the copartnership have no equitable lien upon such effects, as against the claims of creditors of the partner to whom such sale was made.

And where creditors of the partner to whom the sale of the effects of the firm was made have obtained a legal lien upon such effects, by the levy of an execution thereon, they are entitled to retain their lien, as against the vendor and the creditors of the copartnership.

THIS was an appeal by the defendant E. C. Durkee, from a decree of the late assistant vice chancellor of the first circuit. S. O. Durkee, one of the defendants, previous to the 2d of April, 1839, was in business in Schenectady as a grocer, and then had goods on hand to the amount or value of \$975. The capital with which the business had been carried on, with the exception of \$50, had been advanced in property or loaned to him in money by his brother E. C. Durkee. And the amount then due by him to the latter was about \$1100. On the 2d of April, 1839, S. O. Durkee took into copartnership with him, R. C. Ketchum, one of the complainants, and put his goods then on hand into the firm. Ketchum furnished no capital; but on the day the copartnership was formed, the copartners purchased goods to the amount of about \$800, of the administrator of the estate of J. A. Bradley, for which they gave two notes, payable in six and twelve months; which notes were signed by J. B. Ketchum and L. Baker as their sureties. And during the existence of the partnership they also purchased goods of the complainant T. A. Davis, on credit, to the amount of \$700. At the end of four months from the commencement of the copartnership, it was dissolved by the consent of both parties. And Ketchum sold and transferred to S. O. Durkee, his former copartner, all his interest and title in or to the property and effects of the firm, including notes and accounts due, for the consideration of \$175. Durkee, on his part, covenanted to indemnify Ketchum against the payment of any debts of the firm. S. O. Durkee continued the business on his own account for about six or seven weeks after the dissolution, and during that time increased his stock of goods several hundred dollars. A part of those goods were received from his brother, a part were pur-

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chased of others upon credit, and some were purchased with money loaned by his brother. His brother also loaned him \$73, which he applied in payment of debts of the copartnership. On the 16th of September, 1839, a balance was found due to his brother of about \$1500, for which he gave him a judgment. And an execution was subsequently issued upon that judgment, and levied upon the property in the store; consisting partly of property purchased before the commencement of the partnership, partly of the other property formerly belonging to the firm, and partly of the property purchased subsequent to the dissolution. But the whole value of the property thus levied on was less than the amount of the judgment. That part of the property, levied on, which was purchased subsequent to the dissolution of the partnership, was afterwards sold upon the execution for about \$180; and the residue was sold by a receiver, appointed in this suit, for \$626. A few days after the issuing of that execution, S. O. Durkee made an assignment of all his property, debts and effects, to the defendants Meeker and Johnson, in trust, for the payment of certain preferred debts, most of which were his individual debts, and the surplus, if any, to be applied to the payment of his debts generally.

The complainants in this cause, R. C. Ketchum the retired copartner, T. A. Davis a creditor of the late firm, and J. B. Ketchum, one of the sureties of the firm in the notes given upon the purchase of the goods from the representative of Bradley's estate, thereupon filed their bill in behalf of themselves and other creditors of the late firm, against S. O. Durkee and his brother, and the assignees, to set aside the assignment in trust, as fraudulent and void, and to restrain the defendant E. C. Durkee from proceeding to sell that part of the property which once belonged to the late firm, under his judgment and execution. The cause was heard upon pleadings and proofs; an injunction having been previously issued, and a receiver of the property and effects formerly belonging to the firm, having been appointed. The assistant vice chancellor decided and decreed, that the fund in the hands of the receiver belonged to the creditors of the late firm of Durkee & Ketchum; and that neither of

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the defendants had any right or interest in that fund, and that E. C. Durkee was not entitled to any share of the fund until the copartnership debts were fully paid. He therefore directed a reference to ascertain the debts due to creditors of the firm, and a distribution of the fund among them after paying the costs of the complainants out of the same.

*A. C. Paige*, for the appellants.

*John Howes*, for the respondents.

THE CHANCELLOR. The testimony in this cause shows that the whole value of the property assigned to Meeker and Johnson, and which was not bound by the appellant's execution, is entirely insufficient to pay the creditors who are preferred in the assignment, of whom the appellant is not one. He is not interested, therefore, in any part of the decree, except that part of it which affects his right to the fund arising from the sale of the property which had been levied upon by virtue of his execution. And if the other part of the decree is erroneous, the assignees are the proper parties to protect the rights of the preferred creditors by an appeal.

The evidence fully establishes the amount of the indebtedness to the appellant, by S. O. Durkee, and the bona fides of the judgment. I also think, under the circumstances of this case, that the appellant's equity to be paid out of the proceeds of the property levied on by the sheriff, is at least equal to that of the creditors of the copartnership to which a part of that property once belonged. I have not been able to find any allegation in the bill that the copartnership was insolvent, at the time of the dissolution of the firm and the sale of the partnership effects to S. O. Durkee. And the fact that the complainant, R. C. Ketchum, received \$175 for his share of the supposed profits of the firm at the time of its dissolution, is evidence against him that he did not, at that time, consider it insolvent. Upon the dissolution of a copartnership by the death or bankruptcy of one or both of the copartners, the creditors of the firm obtain a quasi lien upon its property and effects; which the court of chancery may work

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out for them in administering the equities between the copartners, or their representatives. The late Mr. Justice Story has fully and ably examined all the English cases on this subject; and he arrived at the conclusion that in case of a bona fide sale and transfer of all the partnership property and effects from one partner to the other, upon the voluntary dissolution of a solvent firm, and without reserving a lien thereon for any purpose, the creditors of the copartnership have no equitable lien on such property and effects as against the claim of creditors of the partner to whom such sale has been made. (*Story on Part.* 508, § 358 to 361.) Here there was an absolute sale of all the property and effects of the firm, by Ketchum to his copartner, when the firm was supposed to be solvent and to have realized a profit upon its business. And at the time of the sale Ketchum relied upon a simple agreement of the purchaser to indemnify him against the payment of the copartnership debts. I think therefore that the appellant, who had obtained a legal lien upon this part of the fund, by the levy of his execution thereon, was entitled to retain that legal lien as against the vendor and the creditors of the late firm.

In the case of *Deveau v. Fowler*, (2 *Paige's Rep.* 400,) which was based upon the decision of Chancellor Jones referred to therein, there was no conflicting claim on the part of any other creditors who had obtained a legal lien upon the fund which had formerly been owned by the copartnership. It was therefore entirely different from this case, so far as the interest of this appellant is concerned. Besides, I am not quite certain that this court gave the proper construction to the agreement of the parties in *Deveau v. Fowler*; in supposing that the intention was that the copartnership debts should be first paid out of the proceeds of the property, before the purchaser should be permitted to apply any part of that property to other purposes.(a)

The assistant vice chancellor erred, in depriving the appellant of the legal specific lien which he had obtained upon the prop-

(a) The decision in the case of *Topliff v. Vail*, (*Harr. Ch. Rep.* 340,) is in accordance with the decision in the case referred to.

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 Gratacap v. Phyfe.
 

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erty by virtue of his levy under his execution. And as that disposes of the case, so far as the rights of the appellant are concerned, it is not necessary to examine the formal objections to the frame of the bill ; or the question as to the right of the appellant to subrogation, to the extent of the advances which he made to pay off partnership debts.

So much of the decree as affects the appellant's right to any part of the property levied on by the execution, or as directs the complainant's costs to be paid out of the proceeds of the sale of any part of that property, or as directs that the appellant shall bear his own costs, must be reversed. And there must be a decree dismissing the complainants' bill with costs as to the defendant E. C. Durkee. The decree must also direct the receiver to pay E. C. Durkee the whole of the fund which has arisen from the sale of the property levied on by virtue of the execution. The residue of the appeal, which relates to other parts of the assistant vice chancellor's decree, in which this appellant has no interest, must be dismissed. And neither party is to have costs as against the other upon the appeal.

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 GRATACAP and others vs. PHYFE, adm'r, &c.

[Approved, 26 Hun 216.]

An order may be granted by a surrogate, after the expiration of eighteen months from the time letters of administration are issued, that the executor or administrator render an account of his proceedings ; upon the application of a creditor, legatee, or next of kin of the decedent. Or such an order may be made by the surrogate *ex officio*, without any application by a party interested in the estate.

But where the order is made by the surrogate *ex officio*, the proceedings are different from what they are when it is made upon the application of some person interested. In the first case, it may sometimes be proper for the surrogate to make an absolute order in the first instance ; as it is a matter resting in his discretion whether he will require an account of the administration of the estate, although no person interested thinks proper to institute a suit for that purpose. It is a proper exercise of such discretion for the surrogate *ex officio*, to require an account from the executor or administrator, whenever, in his opinion, the rights of minors, who are interested in the estate as legatees or next of kin, render such an account advisable.

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On the rendering of such an account, if it appears that the executor or administrator has money in his hands belonging to minors, the surrogate should notify the guardians or relatives of the minors of the fact; so that the fund may be received and properly invested for the benefit of those to whom it belongs.

But in the case of an application by or on behalf of a person claiming to be interested in the estate, as a creditor, legatee, or next of kin, an absolute order to account should not be made in the first instance, and without notice of the application, to the executor or administrator.

The surrogate, upon the presenting of the petition for an account, in such a case, should direct the executor or administrator to be cited to appear and show cause, at a specified time, why an order that he render an account of his proceedings should not be granted; so as to give him an opportunity to object that the affidavit, as to the debt claimed to be due to the applicant, is insufficient, or that he is not interested in the estate as a legatee, or as next of kin, &c. And the party cited may show, in answer to such application, that the right of the applicant to an account is barred by a release, or otherwise.

As a general rule, however, if a creditor swears positively to a debt due to him from the decedent, he will be entitled to an order for an inventory, and an account of the estate. And the surrogate will not proceed to try the validity of the debt, or inquire as to the amount thereof, upon a mere application for an account; where the petitioner does not pray for the payment of the debt.

Even a contingent interest in the estate is sufficient to entitle the party, having such interest, to an order that the executor or administrator render an account.

THIS was an appeal from a decretal order of the surrogate of the city and county of New-York. The appellants, G. P. and J. L. Gratacap, presented a petition to the surrogate, stating that the respondent's intestate was indebted to them at the time of his death, in the sum of \$4800, upon three promissory notes which were then due; that administration upon the estate was granted to the respondent in 1842; and that he had not rendered an account, although more than eighteen months had expired since the letters of administration were granted to him. They therefore prayed that he might be ordered to render an account of his proceedings as administrator. The surrogate, instead of citing the administrator to show cause why an account should not be rendered by him, made an absolute order, *ex parte*, directing that he should appear and render an account of his proceedings on a day specified in the order, or that an attachment issue against him. On the day designated the administrator appeared, and made an affidavit that the petitioners were not creditors of the decedent, and that the notes mentioned



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in their petition were void for usury; that the intestate was sued thereon in his lifetime and set up the defence of usury, whereupon the petitioners discontinued their suit. The surrogate, however, required the respondent to render an account of his administration, pursuant to the directions of the previous *ex parte* order; and an account was rendered accordingly. In the account of his proceedings, the administrator stated that in May, 1843, and more than six months after the granting of letters of administration, he obtained an order from the surrogate directing a notice to the creditors of the intestate, to exhibit their claims, as authorized by the statute, and that the notice was accordingly published; that previous to such order the petitioners had left a statement of their claim upon these notes at the place of business of the administrator, in his absence therefrom; that he rejected the claim, on the ground that it was invalid and usurious; and that no suit had since been commenced for the recovery thereof. He therefore insisted that the claim was barred. No proof of any kind was taken before the surrogate in relation to the existence or validity of the notes mentioned in the petition, nor as to the matters stated by the administrator in the account rendered by him. But the surrogate made an order, which, after reciting that the administrator had rendered an account pursuant to the previous order made on the application of the petitioners, by which it appeared that the claim of the petitioners was disputed and denied, and that such claim had never been presented to the administrator according to law, *ordered* and *decreed* that the applicants had not substantiated their claim, and that the proceedings be dismissed, and that the administrator pay the costs out of the estate.

*M. T. Reynolds & O. L. Barbour*, for the appellants.

*E. Sandford*, for the respondent.

THE CHANCELLOR. The statute authorizes the surrogate to make an order, after the expiration of eighteen months from the time of the appointment of the administrator, that he render an

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account of his proceedings. And such an order may be granted upon the application of a person having a demand against the personal estate of the decedent, as creditor, legatee or next of kin, or in behalf of a minor having such claim; or it may be made by the surrogate, *ex officio*, without any such application. The proceedings, however, are entirely different where the order is made by the surrogate *ex officio*, from what they are when it is made upon an application in behalf of a person interested as a creditor, or as a legatee, or as the next of kin of the decedent. In the first case, it may perhaps sometimes be proper for the surrogate to make an absolute order in the first instance; as it is a matter resting in the discretion of the surrogate, whether he will or will not require an account of the administration of the estate; although no person interested thinks proper to institute a suit for that purpose. And it undoubtedly is a proper exercise of such discretion for the surrogate to require such an account, *ex officio*, whenever in his opinion the rights of minors, who are interested in the estate as legatees or next of kin, render such an account proper. (*Roberts v. Roberts*, 2 *Lee's Eccl. Rep.* 399.) On the rendering of such an account, if it appears that the administrator has in his hands money belonging to infants, the surrogate should notify the guardians or relatives of such infants of the fact; so that the fund may be received and properly invested for the benefit of those to whom it belongs.

But in the case of an application by, or in behalf of a person, claiming to be interested in the estate as a creditor, legatee, or as the next of kin of the decedent, an absolute order to account should not be made in the first instance, and without notice of the application to the administrator. For in such cases the right of the applicant to call for an account may be questioned. The surrogate, therefore, upon the presentation of the petition for an account should direct the administrator to be cited to appear, at a specified time, and to show cause why an order that he render an account of his proceedings should not be granted; so as to give him an opportunity to object that the affidavit of the debt of the applicant is insufficient, or that such applicant is not interested in the estate, as a legatee or as next of kin, &c. And the party

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cited may show, in answer to the application, that the right of the applicant to an account is barred by a release, or otherwise. (*See Millington v. Sorsby*, 1 *Lee's Eccl. Rep.* 525.) As a general rule, however, if a creditor swears positively to a debt due to him from the decedent, he will be entitled to an order for an inventory and an account of the estate. And the surrogate will not proceed to try the validity of the debt, or to inquire as to the amount thereof, upon a mere application for an account, where the petitioner does not pray for the payment of the debt. (*See Smith v. Pryce, Idem*, 569.) Even a contingent interest in the estate is sufficient to entitle the party, having such interest, to an order that the administrator render an account.

In the present case, the account had been rendered ; so that the whole object of the petitioners had been obtained previous to the making of the order appealed from. The order dismissing the proceedings, therefore, did not deprive the appellants of any right or benefit which they could properly claim under this petition. And being altogether extrajudicial, and not founded upon any issue joined in the cause upon a matter of fact which was in a situation to be tried in this proceeding, this order will not prevent the petitioners from bringing a suit and recovering the amount of the notes, if they are not in fact usurious and void ; provided such suit is brought within the time limited by law after the petitioners had notice that their claim was denied and rejected. Whether their claim is in fact barred, upon the state of facts set forth and sworn to by the respondent in his account, is a question which was not properly before the surrogate after the account of the administrator had been rendered. It ought not, therefore, to be passed upon here.

This appeal must be dismissed without costs ; and without prejudice to the right of the appellants to institute such suit for the recovery of the debts claimed by them as they may be advised to bring.

**WHEELER vs. VAN KUREN & RUSSELL.**

A person holding a mortgage against the defendant's property, and also having a judgment against him subsequent in date to the mortgage, which judgment is a lien upon the mortgaged premises, may file a bill in the court of chancery to foreclose the mortgage and to obtain payment of the judgment, although the amount due upon the mortgage is less than \$100, where the defendant has no other property out of which the judgment can be satisfied.

The claim of the complainant, on his judgment, in such a case, as a subsequent lien upon the premises, in connection with the averment that the judgment debtor has no other property, takes the case out of the statute requiring the court to dismiss every bill concerning property where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars.

The question whether the judgment is a lien upon the premises, and is entitled to be paid out of the surplus proceeds of the sale, is one which is necessary to be decided in the suit for the foreclosure of the mortgage. And such a claim is proper to be made in the bill of foreclosure.

THE bill in this cause was filed to foreclose a mortgage on which there was about \$55 due, and also to obtain payment of a judgment of about \$80, which was a lien upon the mortgaged premises. The bill alleged that the defendant in the judgment had no real or personal estate, other than the mortgaged premises, out of which the judgment, or any part of it, could be collected. The bill was taken as confessed against the mortgagor, and against the other defendant who was made a party as having some interest in the mortgaged premises, as an incumbrancer or otherwise, subsequent to the mortgage. The master reported the amount due upon the judgment, as well as upon the mortgage. And the complainant asked for a decree of foreclosure and sale, and that the amount due upon the judgment, as well as the amount of the mortgage, might be paid to him; together with the costs.

*S. H. Hammond*, for the defendant.

THE CHANCELLOR. The court of chancery is required to dismiss every bill concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars. (2 R. S. 173, § 40.) Upon the hearing of this

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cause, therefore, I had doubts whether I could make a decree in favor of the complainant, consistently with this statutory provision, and with the decision of this court in *Duow v. Sheldon*, (2 *Paige's Rep.* 323.) Upon examination, however, I have arrived at the conclusion that the claim of the complainant, on his judgment, as a subsequent lien upon the premises, in connection with the averment that the judgment debtor has no other property, takes the case out of the statute above referred to. The question whether the judgment is a lien upon the premises, and is entitled to be paid out of the surplus proceeds of the sale, is one which is necessary to be decided in this suit. And that claim of the complainant was proper to be made in a foreclosure bill. For a sale under the mortgage would necessarily extinguish the lien of the judgment, and leave the complainant without remedy if his claim was not made in the foreclosure suit. The complainant is, therefore, entitled to the usual decree for the foreclosure and sale of the mortgaged premises; and that the master pay the amount reported due upon the mortgage with interest and costs, out of the proceeds of the sale.

The judgment, however, cannot be paid out of the proceeds, until it is ascertained who is entitled to priority in payment out of the surplus moneys raised upon the sale, after paying the mortgage with interest and costs; except by the consent of the defendant Russell. Under the statute of 1840, as amended by the act of May, 1844, relative to the foreclosure of mortgages, (*Laws of 1844*, p. 531, § 5,) it is necessary to make subsequent incumbrancers by judgment or decree parties, to bar their rights. And as their liens, if any such exist, are not affected by the foreclosure to which they are not parties, it is only necessary to get the consent of Russell, who is made a party, to entitle the complainant to the payment of his judgment out of the surplus proceeds; without the necessity of a reference. The decree may therefore direct that the amount of the complainant's judgment may be paid by the master out of such surplus, upon delivering to the master Russell's written consent to that effect. But if such consent is not obtained, the master must bring the whole surplus into court, after paying the amount reported due upon

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the bond and mortgage, with interest and costs ; to enable Russell to contest the question with the complainant, as to the right of the latter to priority of payment out of such surplus. In that case, the decree will reserve a right to the complainant to apply for a reference to settle that question ; or to apply for payment without the expense of a reference, upon giving notice of the application to Russell.

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## FROST vs. FROST and BEVINS.

**The act of 1840, to reduce the expense of foreclosing mortgages in the court of chancery, applies only to cases in which the complainant can bring his cause to a hearing, and obtain his decree, without the necessity of filing a replication to the defendant's answer.**

**Where an adult defendant puts in an answer, setting up new matters of defence, or putting in issue any material allegations in the bill, so as to render it necessary for the complainant to establish such allegations by proof, at the hearing, the provisions of the act of May, 1840, as to the amount of costs in foreclosure suits do not apply.**

**And the complainant is entitled to full costs in such a case, although he is enabled to bring his cause to hearing upon bill and answer, and to prove the matters put in issue by the answer, at the hearing, by the production of documentary evidence under the second clause of the 17th rule of the court of chancery.**

**Where a bill of foreclosure was filed against several defendants, one of whom put in an answer which rendered it necessary to file a replication ; in consequence of which that defendant, by the final decree in the suit, was charged with the extra costs, thus occasioned, beyond the amount allowed by statute in foreclosure cases where no defence is made ; *Held* that the proper course was to ascertain the whole taxable costs of the complainant, in the same manner as if the defendant against whom the extra costs were charged had been decreed to pay the full costs of the suit, and then to ascertain the amount of costs which would have been taxable, under the statute, if such defendant had suffered the bill to be taken as confessed for want of an answer. The last amount should then be taxed as the general costs of the cause, to be paid out of the proceeds of the mortgaged premises ; and the residue of the full bill of costs, after deducting therefrom the last mentioned amount, should be taxed as the extra costs occasioned by the putting in of the answer of the defendant who was personally charged with such extra costs.**

***Held also*, that in the full bill of costs the fees of the register, or clerk, for all his services, should be charged at the rate fixed by the general fee bill. But in the general**

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costs to be paid out of the proceeds of the sale only the charges for the services of the register or clerk which are allowed under the act of May, 1840, and at the rate therein prescribed, should be included. And that in the full bill, all the necessary disbursements in the suit should be charged, but in the other bill only such disbursements as would have been requisite if the answer had not been put in.

Where the solicitor in the cause actually attends the court, upon the hearing of a cause, he is entitled to the allowance specified in the fee bill; although he is not actually present, in the court room, at the moment the decree is obtained or the cause is argued.

A solicitor is only entitled to an allowance, for attendance upon the examination of witnesses, for the number of days he actually attends before the examiner. He cannot charge for his time in travelling to and from the residence of the examiner. Nor for his attendance over the sabbath, when testimony cannot legally be taken; although he is obliged to remain from home till after the sabbath, to continue the examination of his witnesses the next day.

Where a cause is reached, upon the calendar, and goes over the term at the request and for the particular accommodation of the counsel of the party who finally succeeds in the cause, such party is not entitled to charge his adversary with the costs of noticing the cause, and for the other expenses of the term. But where the cause is not reached upon the calendar, or where it goes off for the mutual accommodation of both parties, those expenses are taxable.

THIS was an application by J. L. Bevans, one of the defendants, for the retaxation of costs in a foreclosure suit. The complainant was the assignee of the mortgage; and Bevans, who was made a defendant as having an interest in some part of the mortgaged premises as a subsequent purchaser, or incumbrancer, put in an answer which rendered it necessary to file a replication and to prove the execution of the assignment. The other defendant suffered the bill to be taken as confessed. The cause was noticed for hearing, and when reached in its order, upon the calendar, the defendant's counsel being absent, a regular decree by default was obtained in favor of the complainant. On the same day the complainant's counsel consented to waive such decree, and to let in the defendant's counsel to argue the cause; and it was not reached again at that term. At a subsequent term the cause was heard, and a decree of foreclosure and sale was obtained. The vice chancellor, before whom the case was heard, also decreed that the defendant Bevans should be personally charged with the extra costs occasioned by the putting in of his answer, beyond the amount allowed by statute in fore-

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closure cases where no defence is made. The counsel for Bevens, upon the taxation, insisted that there were no extra costs occasioned by his answer; and that the complainant was only entitled to the allowance prescribed by the act of May, 1840, as amended in 1841. He also objected to the allowance of the solicitor's and counsel fees at the term when the decree was taken by default and subsequently waived. And other objections were made to the items of the costs before the taxing officer.

*J. C. Wright*, for the complainant.

*R. W. Peckham*, for the defendant Bevens.

THE CHANCELLOR. The act to reduce the expense of foreclosing mortgages in the court of chancery, (*Laws of 1840*, p. 287,) applies only to cases in which the complainant can bring his cause to a hearing and obtain his decree of foreclosure and sale and for the payment of the whole amount claimed in his bill, without the necessity of filing a replication. And where an adult defendant puts in an answer setting up new matters by way of defence, or putting in issue any material allegations in the bill, so as to render it necessary for the complainant to establish such allegations by proof at the hearing, the provisions of the act of May, 1840, as to the amount of costs in foreclosure suits, do not apply. The complainant is also entitled to full costs, in such a case, although he is enabled to bring his cause to hearing upon bill and answer, and to prove the matters put in issue, by the production of documentary evidence at such hearing; under the second clause of the 17th rule of this court. For the answer of the defendant denies a material matter set forth in the bill, within the intent and meaning of that act, whenever such matter is put in issue by the general traverse, or otherwise, so as to render it necessary to prove such matter upon the hearing of the cause. The taxing officer was therefore right in taxing extra costs against the defendant Bevens, under the decree which had been made in this case.

I think, however, he has made a mistake in the principle upon



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which the costs should be taxed in such a case Under such a decree it is impossible to separate the taxable items, so as to make two separate bills of costs each item of one of which bills shall be entirely separate and distinct from the items embraced in the other. The proper course, in such a case, is to ascertain the whole taxable costs of the complainant, in the same manner as if the defendant, against whom the extra costs are charged, was decreed to pay the whole costs of the suit; and then to ascertain the amount of costs which would have been taxable, under the statute, if such defendant had suffered the bill to be taken as confessed against him for want of an answer. This last amount should then be taxed as the general costs of the cause, to be paid out of the proceeds of the mortgaged premises. And the residue of the first bill, after deducting that amount therefrom, should be taxed as the extra costs occasioned by the answer of the particular defendant whose answer caused such extra costs. In the first bill, the fees of the register, or clerk, for all his services, should be charged at the rate fixed by the general fee bill; which is the amount that the complainant's solicitor is bound to pay to the state in such a case as this. But in the last bill, only the allowances, for the services of register or clerk, which are fixed by the act of May, 1840, and at the rate therein prescribed should be taxed. In the first bill, all the necessary disbursements in the suit should be charged; and in the other only those disbursements which would have been requisite if the answer had not been put in. The costs must, therefore, be referred back to the taxing officer to be retaxed upon those principles; and the complainant's solicitor must make out and serve a new bill accordingly.

The complainant was entitled to the solicitor's and counsel fees for attending and arguing the cause at the term when the decree by default was obtained: as the cause was not again reached at that term. The case would have been otherwise if the cause had been reached and again heard at the same term. The solicitor swears he actually attended the court upon the hearing; and though he happened to be out at the moment the decree by default was obtained, he is still entitled to the allowance for attendance specified in the fee bill. As the counsel for

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the defendant did not know the solicitor, his affidavit that he did not see him in attendance is not sufficient to countervail the solicitor's oath that the service was actually performed.

The allowance for six days' attendance on the examination of witnesses was erroneous. The solicitor is only entitled to an allowance for the number of days he actually attends before the examiner. He cannot charge for his time in travelling to and from the residence of the examiner; nor for his attendance over the sabbath, when testimony cannot legally be taken, although he is obliged to remain from home during the sabbath, to continue the examination the next day. Where the cause is reached upon the calendar, and goes over the term at the request and for the particular accommodation of the counsel of the party who finally succeeds in the suit, such party is not entitled to charge his adversary with the costs of noticing the cause, nor with the other expenses of the term. But where the case is not reached on the calendar, or where it goes off for the mutual accommodation of both parties, these expenses are taxable. The execution against Bevens appears to be properly taxable, as prospective costs. But it must be deducted if the costs are paid upon taxation, or before execution is issued.

Neither party is to have costs as against the other upon this application, nor the extra costs of the retaxation.

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 QUINCY vs. FOOT and others.

It is the settled practice of the court of chancery not to set aside a regular order taking a bill as confessed, to enable a defendant to set up an unconscientious defence. And where the defence is usury, the court requires the defendant to undertake that he will not avail himself of that defence, except as to the amount of the usurious premium.

Where an answer was served during the absence of the complainant's solicitor from his office, by delivering such answer to the clerk, at the door of the office, as he was about to open and enter the office, and such clerk immediately afterwards opened

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and entered the office, and took the answer in with him; *Held*, that it was a good service, although the clerk was not actually in the office when the answer was delivered to him.

It is not absolutely necessary that a paper should have been filed at the moment the copy thereof is served, provided it is filed the same day; unless some proceeding has been taken in the meantime to render such subsequent filing improper. But the service of a paper is not perfect until the original is actually delivered to the proper officer to be filed.

It is not sufficient in an opposing affidavit, where the adverse party has no opportunity to answer the same, to state a matter upon the belief of the deponent only.

THIS was an appeal from an order of the vice chancellor of the first circuit, setting aside an order to take the bill as confessed against the defendant E. D. Foote. The answer was completed and sworn to, and copied, on the last day to which the time for answering had been extended; but too late to file and serve it on that day. About nine o'clock in the morning of that day, the clerk of the defendant's solicitor went to the office of the solicitor for the complainant, to serve the answer, but found the door locked. As he turned to leave the office, however, he met the clerk of the complainant's solicitor, who was coming to open and enter the office, and served the answer on him within seven feet of the door of the office. The clerk received it, and within five minutes opened and entered the office with it. At the time the copy of the answer was thus served the original had not been filed; but it was filed the same day. Between two and three o'clock the complainant's solicitor sent to enter an order to take the bill as confessed. And at the same time he sent another clerk to return the copy of the answer served, with a message that he refused to receive it. The answer showed a defence to some of the mortgages for the foreclosure of which this suit was brought; but the defence was usury.

*J. B. Smith*, for the appellant.

*Azor Taber*, for the respondent.

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**THE CHANCELLOR.** It is the settled practice of the court not to set aside a regular order, taking a bill as confessed, to enable the defendant to set up an unconscientious defence. And where the defence is usury, the court requires the defendant to undertake that he will not avail himself of that defence, except as to the amount of the usurious premium; so that the complainant shall not be deprived of what is honestly due him, with interest thereon. The only question therefore is, whether the order to take the bill as confessed was technically regular.

The service of the answer was proper and legal, according to the spirit and intent of the rule, on the subject of the service of papers when the solicitor is absent from his office. For all substantial purposes, this was a service upon the clerk in the office. The reason why a service upon a clerk when he is absent from the office is not allowed, is that a paper thus served may never come to the knowledge of the solicitor, or it may not be received by him in time to enable him to act upon it. But where it is served upon the clerk at the door of the office, in the absence of the solicitor, and the clerk immediately carries it into the office, it is a sufficient service. Here the paper served, actually came into the possession of the solicitor as soon as he came to his office, and two or three hours before the order to take the bill as confessed was entered. And if the solicitor had not mistaken the law on the subject, he could not have made an affidavit that the answer had not been served, for the purpose of obtaining the order to take the bill as confessed. But it was stated in the affidavit of the complainant's solicitor, that the order to take the bill as confessed was entered about half past two o'clock, and before the answer was filed or duly served. And if such was the fact, and the proper evidence was produced to the clerk of the court that the answer was not filed, the order was regular. For although it is not absolutely necessary that the paper should be filed at the moment it is served, provided it is filed the same day, the service is not perfect until the original is actually delivered to the proper officer to be filed. It is evident, however, in this case, that the solicitor of the complainant did not go to the clerk's office at the time

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the order was entered. The statement in his affidavit, as to the answer not being filed at that time, must have been founded upon information merely; and could not have been intended to be sworn to by him as a fact within his own knowledge. It was therefore not sufficient, in an opposing affidavit, where the adverse party had no opportunity to answer the statement. The certificate of the officer with whom the paper was filed, or of his deputy, showing the time of day the answer was received to be filed, and that it was subsequent to the entry of the order, or the affidavit of some one who actually knew the facts, should have been produced, to show that the order was regular.

As the complainant failed to show that his order to take the bill as confessed was technically regular, he was not entitled to retain the order and to shut out any legal defence which the defendant had to any part of the claim made by the bill.

The order appealed from must therefore be affirmed with costs.

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GETMAN and others vs. A. & C. GETMAN.

Where real estate was sold upon execution, and the purchaser at the sheriff's sale sold his bid to two other persons, who advanced the money therefor upon an agreement between them and the wife of the judgment debtor, that her children should have six years to refund the purchase money and interest, and to have a conveyance of the property; *Held* that this was a mere agreement with the mother to sell the property to her children, at any time within the six years, for the purchase money and interest; and that as there was no agreement on the part of the mother, or the children, to take the property and pay for it within that time, it was an agreement without any consideration to support it, and was therefore invalid.

*Held also*, that it was an agreement which required to be in writing, within the statute of frauds, even if there had been a sufficient consideration to support it.

To constitute a resulting trust in real estate, it is necessary that the consideration money, upon the purchase, should have belonged to the cestui que trust, or that it should have been advanced by some other person as a loan to him, or that it should have been advanced as a gift to him or for his benefit.

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THIS was an appeal from a decree of the vice chancellor of the fourth circuit, dismissing the complainants' bill, with costs.

In 1831, G. T. Getman was the owner of a farm in the Stone Arabia patent in the county of Montgomery; and on the 26th of June in that year, he and his wife mortgaged the premises to S. Cogswell, to secure the payment of about \$400 in two years, with annual interest. In December, 1824, they gave a second bond and mortgage upon the premises to the defendants, Adam Getman and Christopher Getman, to secure the payment of about \$200 and interest, in November, 1826. The first of these mortgages came to the defendant, A. Getman, by assignment, in March, 1825. In April, 1825, John T. Getman recovered a judgment in the supreme court against G. T. Getman, for about \$750, and an execution was issued thereon; under which the farm was sold by the sheriff, on the 9th of July, 1825, and was purchased by N. N. Van Alstyne for \$371. Three days after the sale, the defendants A. & C. Getman, purchased the interest of Van Alstyne in the premises; and he directed the sheriff to deliver the deed to them, if the premises should not be redeemed. And in October, 1826, the sheriff conveyed the premises to them. Robert Getman, a son of the former owner, afterwards rented the premises of the defendants, and continued in possession thereof, as such tenant, for one year from the first of April, 1827. The defendant Christopher Getman, in April, 1827, conveyed all his interest in the premises, and in the junior bond and mortgage thereon, to the defendant Adam Getman; and he never afterwards had any interest therein. Robert Getman continued the tenant of the latter from year to year, until 1830; when he gave up the possession to the defendant A. Getman, and relinquished, under his hand and seal, all claim upon the premises. At the time of the sale by the sheriff, G. T. Getman had four sons and three daughters; two of which daughters were then married, and the other married subsequently, but before she was twenty-one years of age. The father was then very intemperate, and continued so until the time of his death in 1835.

In May, 1839, the complainants, all of the children of G. T. Getman except Robert, filed their bill in this cause, stating

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among other things that on the 12th of July 1825, three days after the sale of the farm by the sheriff, the defendant Adam Getman called upon the wife of A. T. Getman and proposed, on behalf of himself and his brother, the other defendant, to advance the money to Van Alstyne for his bid, to prevent the property from being taken from her children, by the sheriff's sale, and to give them six years to repay the money; that she assented to that arrangement, and the same was communicated to Van Alstyne, who also assented thereto, and that his sole inducement for yielding such assent was to benefit the complainants; the amount of the bid being much less than the value of the farm; and that Van Alstyne accepted the amount of his bid from the defendants and authorized the sheriff to give them the deed of the premises pursuant to that agreement and arrangement; that in April, 1828 or 1829, C. Getman, one of the complainants, applied to the defendant A. Getman, and offered to pay him all his fair demands upon the premises, and requested him to release the right which he had acquired under the sheriff's deed, and to account for the rents and profits of the premises; which he refused to comply with in any way, but continued to retain possession of the property, in violation of such agreement. The complainants therefore prayed for an account of the rents and profits of the premises, and that the same might be applied to the payment of what was due upon the mortgages, and upon the amount of the bid at the sheriff's sale; and that the balance, if any, might be paid to the complainants, and that they might be permitted to redeem the premises and to have a conveyance thereof; they being willing and offering to pay any balance which might be found due the defendants, beyond the amount of the rents and profits received by them. The defendant C. Getman put in an answer, denying any agreement on his part, or in his behalf, according to his belief, to purchase the interest of Van Alstyne in any way in trust or for the benefit of the complainants; admitting that he and his brother purchased the right of Van Alstyne and subsequently obtained a deed therefor from the sheriff, and that he afterwards conveyed all his interest in the premises to Adam Getman, as stated in the com-

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plainants' bill. He therefore disclaimed any interest in the premises. Adam Getman, the other defendant, denied that any such arrangement or agreement was made by him with the mother of the complainants, as was alleged in the bill, or that information of any such agreement or arrangement was communicated to the defendant C. Getman, or to Van Alstyne; and that the only agreement that was made with or in favor of any of the children of G. T. Getman, was with Robert Getman, and for his benefit solely; and that his claim under that agreement was relinquished to the defendant in 1830. The cause was heard upon pleadings and proofs before the vice chancellor, who dismissed the bill as to both defendants, with costs.

The following opinion was delivered by the vice chancellor:

WILLARD, V. C. The primary object of this bill is to compel the specific execution of an agreement, alleged to have been made by the defendant, on the 12th July, 1825, relative to the conveyance, by the defendants to the complainants, of a certain farm in the county of Montgomery. From the pleadings it appears that previous to, and on the 4th of April, 1825, one George T. Getman was seised of the premises in question in fee, and being so seised, a judgment was on that day obtained against him in the supreme court, in favor of one John T. Getman, for about \$755,53 debt, and \$17,10 costs; that on the 6th April, 1825, an execution was issued thereon to the sheriff of Montgomery county, who, by virtue thereof, on the 9th July, 1825, sold the premises in question at public vendue, and the same were purchased by Van Alstyne, for \$371, being the highest sum bid.

The complainants and one Robert Getman, who is not a party, are the seven children and only heirs of the judgment debtor, George T. Getman; but as the latter did not depart this life until 1835, neither of the complainants, or the said Robert, had any right to redeem the premises from the purchaser at said sale. That right remained in the judgment debtor, or his grantee, or some creditor of his having a lien upon the premises. No redemption was in fact made by any one.



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The bill alleges that after the sheriff's sale, to wit, on the 12th July, 1825, Adam Getman, one of the defendants, called upon Margaret Getman, the wife of the judgment debtor and mother of the complainants, and represented to her that he and the other defendant, Christopher Getman, were willing to advance the money to Van Alstyne for his bid, to prevent the property from being taken from the children of the said George T. Getman, and that they would give time to repay the money within six years; that the said Margaret assented to the proposition, and communicated it to Van Alstyne, who also assented to it. That on the same day they paid the money to Van Alstyne, who assigned his bid in writing to them, and the sheriff, in October, 1826, conveyed the premises to the defendant, and the latter immediately took possession thereof. In April, 1827, the said Christopher conveyed his interest in the said premises to the defendant Adam, who thus became sole seised of the said premises. The bill also alleges that Robert Getman, one of the children of the judgment debtor, in 1830 released and conveyed all his right and title to the defendant, Adam Getman. That on the 10th April, 1828 or 1829, one of the complainants, Casper Getman, offered the said Adam to pay him all his fair demands on the premises and required him to release his title thereto, and he refused so to do. The bill contains divers other matters; but the foregoing is enough to raise the main question in the cause. The answer denies the agreement, and also interposes the statute of frauds, and insists that the agreement set forth relates to lands, and was not reduced to writing and signed by the party to be charged; and it also sets up the statute of limitations. A want of consideration, and a want of proper parties, and divers other objections were also raised on the argument of the cause. There was no consideration for the alleged agreement. It was a mere voluntary courtesy on the part of Adam Getman. It is not alleged that the complainants, by reason of this offer, were prevented from taking any steps to redeem. Indeed they had no right to redeem. The defendants derived no benefit from the complainants by the proposition, nor did they suffer any loss by the defendants' subsequent refusal to comply with it. Van

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Alstyne had not purchased for the benefit of the complainants, nor is there any allegation that he intended to hold the premises in trust for them.

'The agreement, it appears to me, is within the statute of frauds. (1 *R. L. of 1813*, 78, §§ 11, 12.) The bill seeks to enforce *a contract for some interest in lands*; and this is not only within the letter but the spirit of the act. The answer not only denies the agreement, but insists on the statute. This court, therefore, cannot aid the complainants, unless they prove the agreement as alleged, by some adequate instrument in writing signed by the defendants or by their agent. None such has been proved, and it is not pretended that any such was made. The statute is founded in sound policy. There would be no security in the titles to real estate, if loose and idle conversations could, after a lapse of years, be used as evidence to change the ownership of lands. The mere oral expressions of a party are at all times, and under all circumstances, a dangerous species of evidence. (See *remarks of the Chancellor in Law v. Merrills*, 6 *Wend.* 277.) The application of the statute of frauds in analogous cases may be seen in *Moran v. Hays*, (1 *John. Ch. R.* 341;) *Steen v. Steen*, (5 *Id.* 11;) *Cozine v. Graham*, (2 *Paige*, 181;) *Ontario Bank v. Root*, (3 *Id.* 481;) 2 *Story's Eq.* 60, §§ 75, &c.

That a court of equity is as much bound by the statute of frauds as a court of law, will not, at this day, be controverted. Even before the statute of frauds, it was the constant practice of chancery to refuse a specific performance of an agreement relative to lands, unless it was reduced to writing, or confessed in the answer, or in part performed. (2 *Story's Eq.* 55, 56, § 753, and the note.) The present practice of the court is to decree a specific performance, when the contract is in *writing*, is *certain* and *fair in all its parts*, and is *for an adequate consideration*, and is capable of being performed; and not otherwise. In no case will the court decree the performance of a mere parol contract which is within the statute, where the contract is denied by the answer, and the benefit of the statute is insisted on. The complainants, in all such cases, must be left to their remedies at law.

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If we test this case by these general rules, we find no principle that will justify the granting the relief prayed for by this bill. There was no settling upon the terms of a contract which were certain and mutually obligatory; no adequate consideration, and no written engagement. It is not confessed, but denied by the answer. The complainants' argument to take this case out of the statute is ingenious but untenable. They insist that this is not an agreement for the sale of land, but an agreement to advance money and take a mere lien upon the land, giving the complainants time to repay it. But the agreement obviously contemplated that the title in fee might pass to the defendants before any redemption should be made. An effect therefore could not be given to the agreement without a deed from the defendants to the complainants. The whole structure of the bill in this case contemplates such conveyance. In any aspect of the case there was *an interest in lands* to be affected by the contract, not within the saving clause of the statute, and that is sufficient to bar the present remedy.

This case may be tested by a reference to the rights of the parties at law. If it was ever a case in which this court could entertain jurisdiction to decree the execution of the agreement, a court of law could have afforded relief by an action for damages. The two courts have concurrent jurisdiction, and although there are some cases where equity can grant relief when the remedy at law is gone, this is not one of that class of cases. Suppose an action at law were brought on this contract, who would be the plaintiffs? where would the cause of action be said to have accrued? what consideration would be set forth in the declaration? and what would be the rule of damages? It would be found, I apprehend, extremely difficult to shape a declaration that could be sustained, or to bring the case within any of the exceptions to the statute of limitations.

But the agreement, as set up in the bill, is not proved, even in substance. The answer is responsive to the bill, and denies the agreement. It must be proved by two witnesses; or if the answer is impeached, it must be proved by at least one witness. But the answer is supported, and must, I think, be taken as evi-

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deuce. Margaret Getman is the person to whom the defendant's proposition is said to have been made. Her testimony as to what passed between her and Adam is vague and unsatisfactory. She seems to suppose that her children had a right then to redeem the land; and that Adam wanted to redeem from Van Alstyne in order that she and her children should have six years or longer to redeem in. If she proves any agreement, and I think she does not, it is an agreement different from that in the bill. Robert Getman also proves the agreement to have been, to redeem for the benefit of Margaret Getman and her children. And he supposes they were to have six or seven years to redeem in. This also, vague as it is, varies from the contract set up. John P. Getman, another of the complainants' witnesses, and the creditor under whose judgment the land was sold, was examined as a witness to prove the agreement. He testifies to a conversation had between him and the defendant on the same day, and soon after the alleged bargain was made, as proved by Margaret and Robert. He testifies that Adam then told him that he and Christopher, if permitted to redeem, would give the boys, or any one of them, six or seven years to redeem the lands in. It is scarcely probable that this language would have been used, if he had a few hours before made the bargain set up in the bill, or the one sought to be proved by Margaret and Robert. He does not speak of an agreement already made, though he alludes to the willingness of the witness' mother and Margaret Getman and her family to have him redeem if he would give them six or seven years to redeem the lands in. He speaks rather of an executory offer made in favor of the boys.

There are other circumstances, acts and declarations of the defendant proved, tending to show his intentions to allow the family of Getman to redeem the lands. But all the evidence is too vague and uncertain to make it the basis of a decree against the answer, if there were no other objections to the complainants' case.

If the complainants cannot sustain this bill for a specific performance, it must be dismissed generally. They are not in a condition to redeem under the mortgages; as both of them were

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older than the judgment under which the defendants' title accrues. It is immaterial to the complainants whether those mortgages were paid off or not. If Adam Getman has been paid the amount of the mortgages, the present complainants are not the parties to call him to account for it. The mortgages are *prima facie* extinguished by the union of the legal and equitable estate in the same person.

The statute of limitations would begin to run in the present case from the time the cause of action accrued. If there was a valid bargain and a tender made in 1828 or 1829, of the sum of money which would entitle the complainants to a recovery, the right of action, either at law or equity, would accrue then. With respect to such of the complainants as were not under disability at that time, this action is barred by the statute. It is scarcely necessary to discuss the other question, whether those who were infants are barred, since there are other grounds for the dismissal of the bill.

The bill must be dismissed, as to both defendants, with costs.

*H. Adams*, for appellants. The agreement to advance the money for Van Alstyne's bid, and to give the complainants six years to repay the money in, and redeem the land, was a valid agreement. It was not a contract or sale of the defendants land to the complainants; and therefore was not within the statute of frauds. (1 *R. L.* 78, §§ 11, 12.) It was an agreement to advance money, take a mere lien on the land, and give the complainants time to repay the money. It was like a mortgage, which is only a chattel interest in the land, and the freehold remains in the mortgagor. (*Coles v. Coles*, 15 *John. Rep.* 20.) Such an interest may be transferred without writing. (*Runyan v. Mersereau*, 11 *John.* 534.) A purchaser at a sheriff's sale has a mere lien on the premises, until the time of redemption is passed. (*Russell v. Payn*, 20 *John.* 3. 1 *Cowen*, 443, 501. 7 *Idem.*, 540. 2 *Wend.* 507.) If an absolute interest, conveyed by deed absolute, may be controlled by parol conditions and qualifications, for a much stronger reason should the transfer of a qualified interest be subject to that rule. A conveyance abso-

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lute in its terms, if intended to be a security for a debt, (and such intention may be proved by parol,) is a mortgage. (*Dunham v. Day in Err.* 15 *John.* 555. *Clark v. Henry*, 2 *Cowen*, 324. *Lane v. Shears*, 1 *Wend.* 433. *Roach v. Cozine*, 9 *Id.* 227 *Henry v. Davis*, 7 *John. Ch. Rep.* 40. *Whittick v. Kane*, 1 *Paige*, 202.) An assignment of a land contract, as a security, is a mortgage. (*Brockway v. Wells*, 1 *Paige*, 617.) Mortgages are not considered conveyances of land, within the statute of frauds. (*Runyan v. Mersereau*, 11 *John.* 538.) If the view above taken, that the transaction in this case was an advance of money, and the certificate, with its incidental interests in the lands, was assigned to secure the repayment of the money, and the right of redemption reserved made the interest transferred to and held by defendants in the nature of a mortgage, then the statute of frauds does not apply. Nor does it apply, for the reason that the 11th section relates to contracts for the sale of lands, or interests in lands, which the contractor then has. Whereas the defendants here at the time of making this contract, had no pretended interest; but by the contract they acquired merely a qualified interest, subject to the right of redemption. Nor is the 12th section believed to relate to the question. It provides that all declarations or creation of trusts or confidences in lands, &c., shall be manifested or proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will and testament. This section obviously relates to the final disposition of lands in which the party making the disposition has, at the time, a subsisting fixed interest, and cannot be made to apply to an agreement by which the party acquires a qualified interest subject to the right of redemption. The statute of limitations does not apply. (2 *R. S.* 228, 9.) Section 49 applies to cases where courts of law and equity have concurrent jurisdiction. Section 51 applies to cases where the relief sought is only and solely on the ground of fraud; in which case the bill should be filed within six years after the fraud is discovered. Section 52 applies to all other cases, not provided for in those two sections and the 50th section, and provides for the filing of the bill in ten years. Section 53 provides for disabilities; and being

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married women is one of the cases of disability. (2 R. S. 223 § 16, *sub.* 4; 224, § 24.) The tender was well made, and in due time. The defendants' refusal to receive the money, dispensed with its being counted, and all further form. (*Mann v. Morris*, 7 John. 476 and note (a), and cases there cited. *Slingerland v. Morse*, 8 Id. 370.)

*D. Cady*, for respondents. I. The bill ought to be dismissed as against Christopher Getman, as he had no interest in the premises in question when the bill was filed, as appears from the bill and his answer. Nor does the bill show, that when he purchased of Van Alstyne he was informed of the offer made by Adam, as stated in the bill. The bill alleges that Christopher Getman sold his interest to Adam Getman; that was within six months after the sheriff's deed. The complainant never called upon Christopher for an account, nor asked him for a deed, nor offered to pay him any thing. There was no necessity that he should be a party, as he had no interest; and that fact was known to the complainants.

II. The complainants cannot be entitled to any relief on the ground of a contract; as there was no contract ever made between the complainants and the defendants. The bill alleges that the defendant A. Getman made an offer to the mother of the complainants, but no agreement was made between the complainants and the defendant Adam Getman. The offer stated in the bill, was for the benefit of the children of George T. Getman. The only witnesses who pretend to have heard any thing said by Adam Getman to the mother of the complainants, were Margaret Getman and Robert Getman, and they both swear that the offer was for the mother and her children. Thus proving a different agreement, if any, from the one stated in the bill. According to the bill, the children were to have six years in which to repay the money. Margaret Getman swears that they, (herself and children) might have six years or longer to redeem the land in. Robert Getman swears that his mother and her children should have six or seven years, and if that was not enough, longer time would be given.

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III. The complainants cannot be entitled to any relief on the ground of fraud: 1. Because no fraud has been proved; 2. Because the complainants never had any interest in, or title to, the premises in question; nor have they shown that they should have or could have acquired any title thereto had it not been for the acts or declarations of the defendant Adam Getman. The complainants, if they seek relief on the ground of fraud, must prove the fraud as stated in the bill. If they prove ten thousand other frauds it will not aid them. The acts as stated in the bill are the only acts put in issue by the pleadings, and the only acts which the defendants have been called on to answer. And they must be proved with as much certainty as if the complainants sought relief on the ground of contract by a specific performance. The offer stated in the bill is the only one put in issue, and the only one the proof of which can support the bill. It has been shown under the second point that the offer stated in the bill has not been proved. The complainants had no interest in the premises, nor right to redeem them under the sheriff's sale. They have not shown how they have been injured. (*Brown v. Lynch*, 1 *Paige*, 150.)

IV. If the complainants shall claim that the defendant Adam Getman holds the premises in question as their trustee, we insist that no trust is proved by any written evidence, without which no trust can be enforced in this court. (*R. L.* 1813, 78, 79, §§ 11, 12. *Moran v. Hays*, 1 *John. Ch.* 341. *Steere v. Steere*, 5 *Id.* 11. *Cozine v. Graham*, 2 *Paige*, 181. *Ontario Bank v. Root*, 3 *Id.* 481.)

V. If the complainants ever had any cause of action against the defendants, or either of them, their remedy is barred by the statute of limitations; whether their cause of action was founded upon contract, arose from fraud, or whether a court of law and equity have concurrent, or a court of equity exclusive, jurisdiction thereof. There was no contract made between the defendants and the complainants; but if any contract was made, it was made in July, 1825, and the bill was not filed until May, 1839, nearly 14 years after the offer was made. The sheriff's deed was given in October, 1826, and this bill was not filed until



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more than twelve years after the deed was given, and the complainants then had a right of action, if ever; and double the time necessary to bar their claim elapsed before the bill was filed. (2 R. S. 229, § 51.) If the complainants seek relief on the ground of fraud, they ought to have filed their bill within six years after the discovery of the fraud. The complainants allege that the defendant, Adam Getman, refused to convey in 1828 or 1829. This, according to their own showing, was ten years before the bill was filed. (2 R. S. 224, § 18, *sub.* 4. *Idem*, 228, § 49.)

VI. The fact that two of the complainants were *femes covert* when the cause of action, if ever, arose, can at most only protect them from the statute of limitations, but it is denied that their coverture protects them. If the right of action was a joint right, and if the *feme coverts* and their husbands had refused to join, the other complainants might at any time have filed a bill and made the *feme coverts* and their husbands defendants, and if the right of action was several, then each of the complainants might have filed a bill at any time; so that the coverture of two of the complainants can in no event protect the others. Again; if any contract was made between the complainants and the defendants, it was made not with the *feme coverts*, who are incapable of contracting, but with their husbands, who were bound to act promptly.

VII. If the purchase by the defendant was in trust for Margaret Getman and her children, all of them ought to have been parties to this suit. In this case the want of proper parties appears from the complainants' own proof. The bill sets out an offer for the benefit of the children of Margaret Getman. But the complainants prove an offer to purchase for the benefit of Margaret Getman and her children. This is good cause for dismissing the bill. Margaret Getman, according to her own evidence and that of Robert Getman, has an equal interest with any of the complainants. And if they can sustain this bill for an account and a conveyance for parcels of the premises, she can hereafter do the same thing for another part.

VIII. If the complainants and Robert Getman had any joint

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claim against the defendants founded on contract or fraud, the release or conveyance made by Robert is a bar to complainants' suit. (*Fitch v. Forman*, 14 *John.* 175.) A release by one of two joint covenantees binds both. "They had a joint personal interest, and the release or modification by one would bind the other." "It is a general principle of law, that when two have a joint personal interest, the release of one binds the other." (3 *John. Rep.* 70.)

IX. If the offer, as stated in the bill, was made by Adam Getman and was binding on him, it was upon condition that the complainants should repay the money in six years, and that not having been done, all right under the offer was at an end. Although the offer contains no words of condition as stated in the bill, yet no one can suppose that Adam Getman was to be bound longer than six years, unless within that time the money was paid. It may be said that Casper Getman, one of the defendants, did in 1828 or 1829, offer to pay, and demanded an account. The bill does not state that he acted for the complainants. Should it be said that when the offer was made by Adam some of the complainants were *femes covert* and others were infants, then Casper did not act by their authority. Infants and *feme coverts* are bound by conditions as well as adults. (1 *Bac. Abr.* 401, *tit. Condition, letter F.*) If I covenant to convey to an infant or a *feme covert* if money be paid in six years, they, as well as an adult, must perform by the day.

X. If the complainants ever had a right to a conveyance from the defendants on the payment of any sum of money in pursuance of the offer made by the defendant, Adam Getman, they have, by neglecting to offer to pay and to ask for a conveyance, waived all right to the performance of the offer. (*Bullard v. Walker*, 3 *John. Cas.* 60. *Lane v. Dickerson*, 10 *Yerg.* 373.)

XI. The bill alleges that the defendant Adam Getman made the offer to their mother, for their benefit, but she had no power to accept the offer and thereby bind them. The complainants have not alleged in their bill that they, within a reasonable time, or that they ever, accepted the offer, and thereby became bound to pay. They cannot therefore be entitled to any relief. The

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offer was made in July, 1825, and the complainants never gave notice that they accepted the offer and would perform on their part, and they do not, in their bill, allege that they gave the defendants notice that they accepted the offer and would pay. Were they entitled to fourteen years in which to determine whether they would or would not accept the offer? In the case of *Bullard v. Walker*, the court held that a delay of four years, in performing, was evidence of waiver of a written contract. Mutual consent is necessary to the creation of a contract; and it becomes binding when a proposition is made on one side and accepted on the other. (2 *Kent's Com.* 476.) If a proposition be made, and no time limited for acceptance, it must be accepted within a reasonable time. The party has no right to accept at any time when he thinks fit. No one will say 14 years is a reasonable time in which to accept a proposition, when by the terms of the proposition the contract was to be performed within six years. There was no acceptance of the offer by any one of the complainants, according to their own showing, until 1828 or 1829; and then Casper made an offer which we insist was not in the proper form.

THE CHANCELLOR. It is not pretended in this case that the defendants were to redeem the premises for the benefit of the judgment debtor, or of any person who had any right to redeem the same from the sheriff's sale. The substance of the agreement, as stated in the bill, was that the defendants were to sell and convey the right which they should obtain, by the purchase from Van Alstyne, to the children of the judgment debtor, at any time within six years, for the price they should pay for the same, with the interest thereon. But there was no agreement on the part of the children, or by the mother in their behalf, that they should take the property and pay the amount advanced, or even the interest thereon. The alleged agreement had therefore no consideration to support it, even if it had been reduced to writing.

Again; I see nothing in the alleged agreement, considered either as a contract, or a trust, to take it out of the operation of the statute of frauds which was in force in 1825. As the complainants

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had no estate nor interest in the farm, the only way in which they could be benefitted by the purchase of the interest of Van Alstyne, by the defendants, was through the medium of a resulting trust; or under an agreement of the defendants to sell and convey the premises to them, for the amount of the purchase money paid to Van Alstyne, with interest thereon. But to constitute a resulting trust, to be established by parol evidence, it is necessary that the consideration money for the purchase should belong to the cestui que trust, or should be advanced by some other person as a loan or a gift to him. It was upon the ground that the purchase was in reality made by the Boyds, and that the money paid to the grantor was in fact loaned to them by the person to whom the legal title was conveyed, that this court sustained the resulting trust in the case of *Boyd v. McLean*. (1 *John. Ch. Rep.* 582.) Chancellor Kent says, in that case, "the ground upon which the claim of the plaintiffs rests, is that the \$1500 which were paid to T. Colden in 1807, as the consideration for the purchase of the premises, were the moneys of the plaintiffs, procured from the defendant as a loan; and that the defendant took the deed in his own name, by agreement, and became thereby the trustee for the plaintiffs." In the present case, there is no pretence of a loan made by the defendants to the complainants; nor was there any negotiation for the loan of money. There was no agreement, by any one, to pay the money to the defendants in any event; but, as it is stated in the complainants bill, it was a mere privilege of buying the premises, from the defendants, for the \$371, and interest thereon, at any time within six years, if they should think proper to do so. In other words, the defendants agreed to sell the lands to the complainants at that price, subject to the previous incumbrances thereon, if they should elect to purchase the same. It was therefore a contract to sell land, or an interest in land, within the intent and meaning of the ninth section of the statute of frauds. (1 *R. S. of 1813*, p. 78.) This contract was also void, as being an agreement which was not to be performed within one year from the making thereof. If parol agreements of this kind, in favor of persons who had no previous interest in the land, can be sustained, no purchaser of

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real estate will be safe; and all the benefits intended to be secured by the statute of frauds will be lost to the community. And the present case is also strongly illustrative of the danger of relying upon parol evidence to prove agreements of this description. For although several witnesses have testified upon the subject, no two of them agree in their statements as to what was said, or promised, or agreed to, by the defendants or either of them; and no one of them proves such an agreement or arrangement as these complainants have stated in their bill. Van Alstyne proves an agreement that one of the sons of the judgment debtor should be at liberty to redeem, for the benefit of the family; but within what time, or on what terms, he does not state. J. T. Getman, the judgment creditor and uncle of the complainants, says the defendant A. Getman told him if *the boys*, or any one of them, paid him the amount of the two mortgages and the amount of the bid, at any time within six years, he would give them the land. And this witness agreed that he would go to Van Alstyne and get him to sell the defendants his bid, if they would allow the boys to redeem on these terms. The mother of the complainants understood that all of her children were to have six years, or longer, to redeem the land in. Robert, the brother, testified that the defendant A. Getman applied to the mother for leave to redeem the land for her and her children, and to give them six or seven years to redeem the same; that he wanted C. Getman to go in with him; and she agreed to it, on condition that C. Getman should redeem it with him. And the defendant C. Getman, who was examined as a witness for his co-defendant, testified that Robert applied to him to assist him in redeeming the land, and he finally agreed to do so. But he says no time was fixed within which Robert was to pay the money, until after the arrangement with Van Alstyne was made. And then it was agreed that they should wait upon him as long as the person from whom they had borrowed the money would wait upon them; and that Robert subsequently declined paying the money when it became due, according to his agreement with the witness. It appears by the testimony of another witness also, who was the surety for the money raised to make the ten

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der, that Caspar Getman, one of the complainants, then understood that the bargain had been made with Robert; and that the money was to be tendered to enable him to bring the suit. This was previous to 1830, when the defendant A. Getman compromised the claim of Robert under the agreement, and paid him a considerable sum to prevent the necessity of a litigation with him. Independent of the legal objection to parol evidence to prove the alleged contract with these complainants, the testimony does not establish such an agreement as is set up in this bill; and is wholly insufficient to overthrow the positive denial in the answer.

These several objections being fatal to the claim of the complainants, it is unnecessary for me to examine the question whether their rights, if they ever had any, were barred by the statute of limitations. The decree appealed from is not erroneous; and it must be affirmed with costs.

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 PERRY vs. PERRY.

[s. c. 2 Barb. Ch. 285, 311.]

To sustain a bill, by a husband against his wife, for a separation from bed and board, under the provisions of the 12th section of the act of the 16th of April, 1824, it is not sufficient for him to show a single act of violence on her part, towards him, or even a series of such acts; so long as there is no reason to suppose that he will not be able to protect himself, and his family, by a proper exercise of his marital power.

In such a suit it is material that the husband should establish such a continued course of bad conduct on the part of the wife, towards himself and those who are under his protection and care, as to satisfy the court that it is unsafe for him to cohabit, or live with her. Hence, it is not impertinent to state, in a bill of this nature, acts of violence and misconduct, on the part of the defendant, towards the complainant's children and other members of his family.

THIS cause came before the court upon exceptions to a master's report, allowing forty-three exceptions to the complainant's bill for impertinence. The bill was filed by the husband, against his wife, for a separation from bed and board, under the

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provisions of the twelfth section of the act of the 10th of April, 1824. (*Laws of 1824, ch. 20, p. 249.*) The bill, after stating the marriage of the complainant with the defendant, and the situation of his family at that time, as well as at the commencement of this suit, proceeded to state the various acts of violence and misconduct of the defendant, towards the complainant and his children by a former marriage, as well as towards his two children by her, which rendered it unsafe and improper for him to cohabit with her. As to her actual misconduct towards himself, the bill stated that the defendant had committed various acts of violence upon his person, the marks of one of which acts of violence were visible for more than two years; that she had assaulted and struck him on several occasions, and had repeatedly, during the year previous to the filing of the bill in this cause, expressed the wish that he was dead; that such declarations had been made so often recently, and with such apparent earnestness, as to produce serious apprehensions upon his mind as to his personal safety; and that in consequence thereof he had, for some time, lodged in a different part of his house from that which was occupied by her. The charges in the bill which were excepted to as impertinent, related to her violence and misconduct towards his children, and other members of his family, &c.

*J. Rhoades*, for the complainant.

*N. Hill Jr.*, for the defendant.

THE CHANCELLOR. If the exceptions in this case were good in substance, they are clearly defective in form. For, as they are allowed by the master, they leave some parts of the bill not embraced in the exceptions, perfectly senseless. Besides, they are improper in form in dividing up the charges in the bill, by several exceptions to different parts of the same charge; where it was evident that if any part of the charge was impertinent the whole was so. I have not thought it necessary, however, to examine the various exceptions in detail, as I have

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arrived at the conclusion that the several charges in the bill, covered by these exceptions, are pertinent and proper. To sustain a bill of this kind, by the husband against the wife, it is not sufficient to show a single act of violence on her part towards him, or even a series of such acts; so long as there is no reason to suppose that he will not be able to protect himself and his family by a proper exercise of his marital power. It is material, therefore, that he should be permitted to establish such a continued course of bad conduct on the part of the wife, towards himself and those who are under his protection and care, as to satisfy the court that it is unsafe for him to cohabit or live with her. The charges in the bill which are excepted to, if admitted by the answer of the defendant, or proved on the hearing, would go far towards convincing me that the complainant's life would probably be in danger, should he continue to reside under the same roof with her after he should have exercised his marital power for the proper protection of those under his care, against her repeated acts of violence and misconduct. These charges are, in substance, that she drove his sick daughter C. from her bed, beat and wounded her, and finally by violence forced her to leave his house, and probably shortened her life by breaking in her ribs, that she drove his son from the house when he was wasting away with consumption; that she beat and lacerated her own grown up son in such a manner as to confine him to the house for several days; that her conduct towards his daughter M., who was dying with the consumption, was such as to render it necessary for the complainant to secure the room of such daughter by locks and bolts, whenever he was from home, to protect her from the violence of the defendant; that the clergyman, who was called to administer the consolations of religion to the dying daughter, was compelled to discontinue his visits in consequence of the defendant's conduct towards him; that she beat her own grown up daughter, pulled a handful of hair from her head, and injured her so severely that she fainted; that at other times she struck the same daughter with violence, threw a cup of tea in her face, struck her on the head with an earthen vessel, threw her upon the floor and jumped upon her, &c.; that she beat a child, who



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was bound to her, so severely that the child was discharged by the magistrates; that she attacked a workman, employed by the complainant, with dangerous weapons, and drove him from the house; that by her violence and misconduct she has disturbed, and at last compelled her husband to abandon his accustomed family worship; and that she is in the daily habit of using obscene and blasphemous language in presence of the family, and at their meals.

These facts, if proved, or if admitted by the answer, will have a very great influence in giving character to the acts of personal violence which are stated in the bill as having been committed by the defendant, upon the complainant. And if such facts are proper subjects of proof in the cause, the complainant may state them in a bill for discovery and relief. (*Story's Eq. Pl.* 221, § 268; *Hawley v. Wolverton*, 5 *Paige's Rep.* 523.)

None of the exceptions for impertinence in this case were well taken, and they should not have been allowed by the exception master. The exceptions to the master's report must, therefore, be allowed; and all the defendant's exceptions to the bill must be overruled.

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 TYACK and others vs. BRUMLEY and others.

The powers given to the master and wardens of the port of New-York by the 5th section of the act of February, 1819, were in the nature of a franchise; and were in their nature exclusive, until the legislature should think proper to repeal or modify the law, or should authorize other persons to perform the same duties.

That statute creates or provides for the appointment of public officers, and devolves upon them certain powers and duties which the interest of the public requires should be performed by persons duly authorized and selected in the mode prescribed by the legislature. And it is a usurpation of power for another body of men, under a different name of office, to attempt to perform the duties assigned to the port wardens and to establish a tariff of fees of office for the discharge of such duties.

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The chamber of commerce and the board of underwriters, of the city of New-York, have no right to appoint a board of public agents to discharge the ex officio duties which the legislature has previously imposed upon a board of officers to be appointed by the governor and senate.

Port wardens, by the common law, were not *ex officio* surveyors of damaged vessels or damaged goods. And the exclusive powers originally conferred by statute, upon the master and wardens of the port of New-York, as surveyors, having been taken away by the act of 1819, such master and wardens are no longer *ex officio* surveyors of damaged goods imported into the city of New-York; except in the cases specified in the fifth section of that act, viz: when such damaged goods are required to be sold, by the owner or consignee, on account of such damage, and for the benefit of underwriters who do not reside in New-York.

But as the statute does not prohibit the master and wardens from acting as surveyors in cases not mentioned in the act of 1819, it is proper to have a tariff of fees which shall apply to other surveys, in case they shall be made by such master and wardens, as had been done previous to that act. The granting of a fixed rate of fees for particular services, however, does not, even by implication, give to the master and wardens the exclusive right to perform such services; nor does it interfere with the right of others to perform similar services for such persons as may think fit to employ them.

THIS was an appeal from an order of the vice-chancellor of the first circuit, allowing an injunction. The complainants, the master and wardens of the port of New-York and their clerk, filed their bill in this cause to restrain the defendants from interfering with their duties and franchises, as wardens of the port of New-York. The bill, after stating the appointment of the complainants, and their rights under the act of 1819 relative to the master and wardens, harbor masters and pilots of the port of New-York, alleged that the defendants, intending to injure them in the enjoyment of those rights, and to deprive them of their business and emoluments, had confederated and associated together for the purpose, and with the intent, of usurping the duties of the office of the complainants; that they had entered into an agreement between themselves to open an office, or place of business, in New-York, for the transaction of the business and the performance of the duties which belonged to, and would otherwise devolve upon, the complainants by virtue of their offices, and had opened an office or place of business accordingly; that they had issued circulars, holding themselves out to the public as a board of persons who were authorized and competent to

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perform, in relation to marine surveys, the duties of the complainants as port wardens; that the said confederates openly and publicly declared that their design was to put down the office of the complainants, by discharging the duties of the same themselves, and to deprive them of the business and emoluments thereof; that for that purpose they had assimilated their association and their mode of doing business, as near as might be, to the organization of the complainants, and had given out that they performed the same duties, and might be relied on by the public as more competent and proper to discharge such duties than the complainants; and that they thereby deceived and deluded persons connected with foreign vessels and merchandize who were unaccustomed to the laws and regulations of the port of New-York, and thereby obtained the business which properly belonged to the complainants, and had exacted and received therefor a large amount of fees which would otherwise have been received by the complainants. The bill also charged that the defendants as such confederates, had made and executed surveys of damaged goods and merchandize, and made and granted certificates, in apparent official form, similar to the certificates granted by the complainants in like cases, on board several vessels in the port of New-York, specified in the bill, in cases contemplated or referred to in the act of 1819 imposing duties belonging to, or which devolved upon the complainants by virtue of their offices; that they had assumed to execute a survey of the ship Florida, in the port of New-York, which was deemed unfit to proceed to sea with her cargo, and were then engaged in such survey; and that the defendants, although requested to discontinue such injurious acts persisted therein, and gave out that it was their deliberate intention to continue the operations of their said board, in opposition to the complainants, and to draw off and deprive them of their business, as far as they were able to do so. The complainants therefore prayed that their exclusive right to perform the business and duties of their said offices, and to receive the fees and emoluments thereof, might be established by a decree of the court; and that the defendants might be perpetually enjoined from molesting them in

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the enjoyment thereof; and for an account of the fees and emoluments received, &c. In opposition to the application for an injunction, the defendants put in affidavits, stating that they had not claimed the offices or names of port wardens, or clerk of the port wardens since the appointment of the complainants but that six of the defendants had been appointed by the chamber of commerce, and by the board of underwriters of the city of New-York, a board of marine surveyors, and the other defendant had in like manner been appointed the clerk of such board. And that they had organized their board accordingly, and opened an office, and given notice that they had been so appointed to survey ships and merchandize; and that they had established a tariff of fees for surveys on board of vessels and on merchandize, and for surveys of vessels put into the port of New-York in distress and needing repairs, and for granting certificates of such surveys. But the defendants denied that they had ever exercised or claimed to exercise the power to sell, or to have sold under their inspection, vessels or goods arrived at the port of New-York damaged, and by the owners or consignees required to be sold at auction, on account of such damage, for the benefit of underwriters out of the city of New-York.

The vice chancellor, after hearing the parties by their counsel, made an order for an injunction; restraining the defendants from disturbing the complainants, or any of them, in the use, enjoyment or exercise of the several duties appertaining to them as the master and wardens of the port of New-York, or as their clerk, or taking the fees thereof; and particularly from acting as surveyors of any vessel deemed unfit to proceed to sea, and from judging or acting as judges of the repairs which might be necessary for the safety of such vessel on her intended voyage; and from selling under their inspection, vessels or goods arriving at the port of New-York damaged, and by the owners or consignees required to be sold for the benefit of underwriters out of the city of New-York, and from certifying the cause of such damage, the amount of sale of such vessel or goods, and the charges attending the sale; and from taking or making any survey on board of any ship or vessel, or at any store in the

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city of New-York or along the docks or wharves thereof on damaged goods, and from giving or granting any certificate on account of damaged goods; and from taking or making any survey on board of or relating to any ship or vessel put into the port of New-York in distress, to ascertain the damage sustained by her, whether such ship or vessel should pay or be liable to pay foreign duties and tonnage or otherwise; but that the defendants should be at liberty as individuals, and in common with other citizens, to act as surveyors, appraisers of damages, arbitrators or judges, whenever called upon and appointed by the mutual consent and agreement of the owner or consignee, and the domestic or resident underwriter of any ship or vessel arriving damaged, or of goods or merchandize damaged, or becoming damaged on board any vessel in the port of New-York where all parties having an interest in the vessel and in the prosecution of her voyage, and in the goods, were present and thought proper to dispense with a regular and official survey by the port wardens, and to employ the defendants in their individual and private capacities to perform the service; provided they were not employed as legally constituted surveyors of the port, nor as surveyors to make and certify surveys in the manner and similitude of port wardens' surveys, nor with an intention that their acts should have the force and effect of port wardens' surveys or any other effect than belonged to the acts of individuals in a matter of private business.

The following opinion was delivered by the vice chancellor:

W. T. McCoun V. C. The complainants are the individuals who compose the board of port wardens of the port of New-York, to which office they were appointed by the governor and senate of the state. The defendants are an equal number of persons, who have assumed the name of "marine surveyors for the port of New-York," and have undertaken to perform many of the duties which the complainants claim to belong exclusively to them, by virtue of their office; and it is the principal object of the bill in this cause, to restrain the defendants from such interference. The bill, in the first place, refers to the law

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of the state creating the office of master and wardens of the port; and it then shows that the complainants have been duly appointed, and have taken the oath of office, and are in discharge of the duties thereof, and as such incumbents they insist that they are entitled to perform all the duties and transact all the business appertaining to the office, and to receive all the fees and emoluments thereof, but that the defendants, fraudulently intending to injure the complainants in the enjoyment of their office, and to interrupt and disturb them therein, have under various unfounded pretences set about depriving them of their business, and have opened an office contiguous and nearly opposite to the location or office of the complainants, in the same street, from which the defendants have issued a circular and cards of business, holding themselves out to the public as a board of persons authorized and competent to perform the duties of the complainants in relation to marine surveys.

The defendants show by their affidavits, (they not having yet answered the bill,) that having been appointed by the chamber of commerce and board of underwriters of the city of New-York, to survey ships and merchandize, they issued a circular headed "Marine Surveyors' Office" and dated May 25th, 1843, announcing the fact of such appointment and that they had taken an office 67 Wall-street, for the accommodation of merchants and masters of vessels, to be kept open daily throughout the year, and that their charges for surveys would be as follows: for every survey on board vessels and on merchandize, \$2; for every certificate of the same, \$1; for every survey on vessels put into this port in distress or needing repairs, \$2,50; for every certificate of the same, \$2,50. They also issued a card in these words, "Marine surveyors, port of New-York, appointed by the Chamber of Commerce, and board of underwriters; office 67 Wall-street," with their names.

The defendants also exhibit a certificate dated, 9th June, 1843, from the chamber of commerce and the board of underwriters, stating that the defendants were appointed by their respective boards as suitable persons to act as marine surveyors for the port of New-York, and recommending them accordingly in all cases

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where their services might be required. Still, in their affidavits they disclaim all interference with vessels or goods arriving at the port of New-York in a damaged state, which may be required to be sold at auction for the benefit of underwriters out of the city of New-York. They do not however deny, what is very strongly imputed to them in the charging part of the bill, viz: that they have fraudulently combined to injure the complainants, to interrupt them in the enjoyment of their office, and to deprive them of the business and emoluments belonging to it. Nor do they deny, that they have set on foot the plan of opening and keeping an office for that purpose, and that they do openly and publicly declare, that their design is to put down the office of the complainants by discharging the duties thereof themselves, and that they have assimilated their association and their mode and manner of doing business as near as may be to the organization and arrangement of the complainants; giving out that they perform the same duties and may be relied on as being more competent, and that their acts will be more authentic. Nor do they deny, that they have held surveys of damaged goods on board of a number of vessels, have granted certificates in apparent official form, similar to certificates granted by the complainants in like cases; and in one instance, (the case of the ship *Florida*,) which had finished taking in her cargo and while in port had sprung a leak, put themselves forward to make the necessary survey for repairs, and had either made such survey or were then engaged in making it, in defiance of the complainants. Neither do they deny, that the complainants have remonstrated with them and requested them to desist, and that they have refused, and still give out that it is their deliberate intention to continue their opposition, and to use all their influence entirely to supplant them in their official business.

These and other similar charges in the bill, not being denied, must for the purposes of the present application be taken as true. Whether the motives with which this opposition has been got up and is persevered in, as charged, can have any influence upon the question of this court's jurisdiction it may become necessary to inquire. But the first question to be considered is, what are

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the complainants entitled to *virtute officii*? Is it to the sole and exclusive enjoyment of the business belonging to the office of port wardens as established by law, or is it a business in which they may be only allowed to participate in common with others who may assume to perform the same or similar functions?

The office of port wardens is one of considerable antiquity even here. It was established by law, during the existence of the colonial government, (1 *Smith & Liv.* 160,) and it has been continued by repeated acts of legislation down to the present time, with but slight alterations. The last act and the one now in force, so far as regards the powers and duties of port wardens in respect to the present question, was passed Feb. 19th, 1819. (*Laws of 1819, ch. 18.*) By this law they are made public officers. They are appointed as such by the governor and senate, and are organized as a board or body politic, under the name of the master and wardens of the port of New-York, with power in that name, as a corporation, to sue for all fines, penalties and forfeitures arising under the act, and to use a common seal. They take an oath of office; are required to appoint a clerk to keep an office open, where they are to give daily attendance, and where their clerk is to keep a record or book of entries of all their proceedings, which is to be open to the inspection of all persons desiring it. The arrivals of all foreign vessels are to be reported at their office under a penalty of \$50 for each neglect, and certain fees are payable to them with the report of every such vessel.

By the 5th section of the act, (the most important to the present purpose,) their powers and duties with respect to the survey of vessels and damaged goods are declared. They, or any two of them, with the assistance of one or more skilful carpenters, shall be surveyors of any vessel deemed unfit to proceed to sea. They or any two of them shall be judges of the repairs which may be necessary for the safety of such vessel on the intended voyage. And in all cases of vessels and goods arriving damaged, and by the owner or consignee required to be sold at public auction on account of such damage and for the benefit of underwriters out of the city of New-York, such sale shall be under



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their inspection, and when required by the owner or consignee, they shall certify the cause of the damage, the amount of sale of the vessel or goods, and the charges attending the sale. For these and all other services their compensation is fixed in the shape of commissions and fees.

From this brief analysis of the statute and of the powers it has conferred, and from the fact that a public office is created, and that the persons appointed to fill it are, from the moment they enter upon their duties, public officers, I think it follows, that their powers are and necessarily must be deemed exclusive, such as no other persons without a similar authority of law are at liberty to perform. The statute is of itself a grant of powers to be exercised in the cases specified and in the manner pointed out, for the purpose of subserving the great interests of navigation and commerce in the port of New-York. It is in fact the grant of an office, in the nature of a franchise, like the grant of a ferry or a toll bridge, or of the right to hold a public fair or market; and a similar grant, for like purposes, may at any time afterwards be made to others. (See the great case of the rival bridges, 11 *Peters' Rep.* 420, for the principle.) But without the grant of a rival power from the same authority, individuals have no right to set up a rival office or business, and assume to themselves the performance of the same public duties for the like emoluments. It matters not, in my judgment, whether there be any express prohibition, or restraining law, to prevent such rivalry or not. The grant itself in the case of an office of this sort implies a prohibition against its exercise by others, unless they can show an equal authority. The language of the 5th section is imperative and explicit; the persons holding the office shall be surveyors; they shall be judges of repairs; sales shall be under their inspection; and they shall certify the cause of damage, the amount, and the charges attending the sale. This is tantamount to saying they shall be the surveyors and the judges and the persons to perform the other prescribed duties, and that no other persons shall possess the same or similar powers.

Then to what does this exclusive power particularly relate, and where is its limit? It relates to the survey of vessels with

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a view to ascertain their seaworthiness, and the necessity and extent of repairs to enable them to prosecute the voyage in which they are engaged. It does not of course apply to or include vessels lying in port and requiring ordinary repairs or overhauling previous to taking on board a cargo; for in all such cases the master and owners being alone interested must be left to determine for themselves the repairs and outfits, and they may or may not, as they shall think proper, call to their assistance third persons to determine for them. But this provision of the law does apply to all cases of vessels actually engaged in the prosecution of a voyage, which have put into port, owing to some disaster or injury sustained, which has interrupted its prosecution; and also to vessels in port, which having taken cargo on board, and being about to commence a voyage, have sprung a leak or met with some accident to affect their safety on the intended voyage. These are cases in which the regular appointed master and wardens of the port have the exclusive right to hold surveys and to judge of the necessity and extent of repairs, and to give the proper directions therefor.

The reasons for vesting this power in persons selected for their skill, and clothed with public authority, is obvious enough; there may be others interested in the safety of the vessel besides the master and owners. Shippers of cargo, passengers who have embarked or placed property on board, mariners hired to go the voyage, all have a right to the judgment of impartial and disinterested men as to the safety of the vessel and her ability to proceed to a successful termination of the voyage, whenever any disaster has occurred to the vessel calculated to increase the hazard, or to place their property and lives in greater jeopardy. So with respect to vessels and goods arriving in a damaged state, and which in consequence thereof, are required to be sold for the benefit of underwriters out of the city of New-York, it is conceded by the defendants, that the power belongs entirely and exclusively to the legally constituted master and wardens of the port, to hold the surveys and attend the sales and give the necessary certificates of the result. But it is said they can have no such exclusive and compulsory right when a vessel and goods have

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arrived in a damaged state, and the same are insured by resident underwriters who are present to look after their own interest in the property. I agree to this proposition. It must be so. The law appears not to embrace the case in terms, and there is no reason why it should. The owner or consignee and the underwriters, being on the spot and seeing the damage, may agree upon the amount to be paid for loss, without a previous survey; or they may select any person to appraise the damage, and agree to abide by his report, or award. Or if they should deem a sale of the damaged property advisable, they may agree upon an auctioneer, and the time and place of sale, and may attend to see that the sale is fairly conducted; and having the result before them, they can then adjust and settle the account of loss. So likewise if the property should be abandoned to the underwriter; he being present may at once agree to accept it and pay for a total loss, and immediately take possession and dispose of the property in his own way; for in all such cases there is no necessity for the intervention of the law through the medium of public officers. But if a regular and formal survey should be deemed advisable or expedient for any purpose, on board of any ship, or vessel, or at any store in the city of New-York, or along the docks or wharves thereof, on damaged goods, or on board of any ship or vessel put into the port in distress, to ascertain the damage sustained; whether with a view to a sale at auction or not, then it appears to me, the port wardens are the only persons who can properly and legitimately make the surveys. Because the law has prescribed certain fees which they shall be allowed to take for every such survey, and for every certificate given in consequence of finding damaged goods, and for every certificate of damages sustained by every ship or vessel which has put into the port in distress. A grant of fees or perquisites seems to me necessarily to include within it a grant of the power or authority to perform the service for which the fees are given; and it follows also, that the grant is and must be of an exclusive character.

The words quoted from the latter part of the 5th section are to this effect; and this construction does not conflict with the lib-

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erty, which the parties in interest have, to dispense with surveys altogether, by their mutual agreement, in the cases which I have supposed, or to call in third persons, of their own choosing, to perform a mere friendly, unofficial act between them. But such persons cannot be employed as legally constituted surveyors of the port; nor as surveyors to make and certify surveys in the manner and similitude of port wardens' surveys; nor with the intention that they shall have the same force and effect, or any other effect than belongs to the acts of mere individuals in a matter of private business.

There is another class of cases which clearly belong to the supervision of the port wardens, and in which their services cannot be dispensed with; although there may be no necessity for effecting a sale either of the vessel or goods arriving in a damaged state, within the letter of the statute. These are cases in which the government is concerned, in respect to duties. The act of congress (1 *Story's Laws of the U. S.* 625, § 60,) provides for the unloading of vessels free from duty, which arrive in distress at ports to which they are not bound, upon the production to the collector, among other things, of the certificate of the port wardens of the port, showing the necessity of unloading the vessel. If there are such officers as port wardens at the place of arrival, they are the persons, primarily and exclusively, entitled to hold the surveys and to grant the certificates, and the collector is not authorized to receive the certificates of any other persons; but if there are no such officers at the place, then the certificate of other persons may be received. If there are any other provisions in the revenue or navigation laws of the country, having reference to official acts of port wardens as evidence for any purpose, then it is also clear, that in all these cases they have a right to perform the service, exclusively of all other persons, unless the law admits of a concurrent authority and right in others to do the same thing.

Having thus shown what appears to be the just conclusion in regard to the law conferring powers upon the port wardens, and having pointed out in what particulars it is a grant of exclusive powers in virtue of their office, and in what cases their services

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may be dispensed with, I would now observe, that the appointment which the defendants have so publicly exhibited from the chamber of commerce and the board of underwriters, can be of no avail to them against the legal rights of the complainants. If by that appointment it was intended, as it purports on its face, to clothe the defendants with authority as "marine surveyors for the port of New-York," to act in all cases where surveys might be required of vessels or merchandize, and to perform the same duties in all respects as port wardens, then they have greatly mistaken the law and the powers which these mercantile institutions possess, however venerable the one and highly respectable both may be. They have no authority to make such an appointment, or to sanction the establishment of a self-constituted and organized body of persons, for the purpose of supplanting the lawfully constituted board of port wardens. Such an attempt would be but an act of insubordination to the laws of the state, if not a downright usurpation of the powers of government, which it is hardly to be supposed could have been contemplated or intended. It is much easier to believe, that what is made to assume the appearance of an appointment of public officers, and the establishment of a rival office of marine surveyors, was designed merely to recommend the individuals named as suitable persons to be employed in making surveys of sea damage, wherever they can be thus employed without encroaching upon the rights of the complainants. And it is to be regretted that, in granting that favor, they had not used words in that limited sense, instead of recommending them as "marine surveyors for the port" in all cases, without discrimination. It may be further observed, that if the office of port wardens, as established by law, is a monopoly, and for that or for any other reasons of state policy or expediency at this day ought to be suppressed, and the business thereof thrown open to free competition; or if the incumbents, for the time being, are not so competent or well skilled as others may think themselves, or be thought by others to be, to discharge its duties, it is not for individuals or mercantile associations or combinations of any sort to take the law into their own hands and treat it as a dead letter. So long as a law

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remains unrepealed, it must be respected and obeyed, although it may seem to operate harshly by conferring exclusive rights and privileges on the few, at the expense of the many. Courts of justice are bound to aid a party in possession of rights, whether they be natural or artificial, or such as are the mere creations of law, whenever those rights have been infringed, or their destruction is threatened. In the one case, the grievance is redressed by the award of damages—in the other, a preventive remedy may be sought for in the extraordinary powers of a court of equity. Then is the present case one which calls for the latter remedy, and is it within the well established bounds of this court's jurisdiction to grant it? It is objected that there is a remedy at law. This may be very true, but it does not follow that chancery may not interfere. An action on the case, every time the complainants' rights are invaded, would be extremely troublesome. It might keep the complainants constantly on the alert to find out when they were injured, and where to procure the necessary witnesses to prove it, and from the frequency of the acts, many of them might escape detection. The remedy by information in the nature of a quo warranto, or by indictment, as for a misdemeanor, which were suggested in argument, even if the case is within the provisions of the statute on either of those subjects, which is at least doubtful, (2 R. S. 581, § 18; *id.* 696, § 39,) might not afford that full and adequate relief to which the complainants are entitled. It is an old saying, that prevention is better than cure, and it holds good in cases of this sort.

Again; it is contended that the complainants should establish their rights by a judgment at law, before coming into the court of chancery. This the court will sometimes require. In cases of doubt or difficulty upon the law, or the facts, it is discreet to await the decision of a court of law upon the legal right set up. But where a clear case of a statutory, or common law right is presented, and the party is in the possession and enjoyment of the right, which is being daily and continually violated, this court may, and often does, interfere without waiting the previous action of another court. (9 *John. Rep.* 569, 570, and 585 587.)

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With regard to the jurisdiction of the court of chancery, in cases of this sort, I think it is abundantly established. Cases have occurred perfectly analagous in principle, in which the power of this court by injunction has been exercised without hesitation, and such cases are high authority as precedents. Indeed, it has become a familiar head of equity jurisdiction to protect, by injunction, statutory rights and privileges which are threatened to be destroyed, or rendered valueless to the party by the unauthorized interference of others. The first case I shall refer to, is *The Croton Turnpike Company v. Ryder*, (1 John. Ch. R. 611,) where Chancellor Kent held it to be settled, that an injunction is the proper remedy to secure to a party the enjoyment of a statute privilege of which he is in the actual possession, and when his legal title is not put in doubt. The English books, he observed, were full of cases arising under this head of equity jurisdiction; but it was unnecessary to enter into a discussion of them, for the point had been then recently settled in this state on an appeal in the case of *Livingston & Fulton v. Van Ingen et al. in error*, (9 John. Rep. 507.) The jurisdiction he considered very benign and salutary; for without it the party would be exposed to constant and ruinous litigation, as well as to have his rights excessively impaired by frauds and evasion. The case referred to deserves a farther notice as being peculiarly applicable to the one in hand. It arose out of the grant of the legislature to Messrs. Livingston and Fulton, of an exclusive right to navigate the waters of the Hudson, by steamboats, for the period of thirty years. The defendants, disregarding that act of the legislature, built and put a steamboat upon the river, in opposition to the complainants. They filed their bill for an injunction, and upon an order to show cause before the then Chancellor Lansing, he refused the injunction, upon which the complainants appealed to the court for the correction of errors. The defendants insisted, that the grant was void on two grounds; 1st. That it interfered with the power which belonged entirely to congress to promote the progress of science and the useful arts by securing to authors and inventors the exclusive right for limited times; and 2d. That it

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interfered with another power vested in congress by the constitution, viz. that of regulating commerce with foreign nations and among the several states. And furthermore, that if the grant was such as the state legislature had a right to make, the complainants should be left to the remedy which the legislature had in the act itself provided, viz. a forfeiture of the boats; and that at all events the court of chancery ought not to interfere by injunction until those questions of law were determined, and the complainants' right to the exclusive navigation of the river was established. It was, however, decided by the unanimous opinions of the judges, to be a proper case for the interference of the court by injunction, even in that preliminary stage of the cause. That the chancellor ought to have granted it, enjoining the defendants until the hearing of the cause; and then to be made perpetual, if the claim should be sustained. And the cause was remitted to the chancellor, with directions to issue the injunction. Although some years afterwards the Livingston and Fulton monopoly of steamboat navigation in the waters of New-York was destroyed, by the decision of the supreme court of the United States, in the great case of *Gibbons v. Ogden*, (9 *Wheat. Rep.* 1,) upon the constitutional objection of its grant being repugnant to the power vested in congress to regulate commerce, which was held to be exclusively there, and no part of which could be exercised by a state; yet that decision did not reach the point of chancery jurisdiction, to sustain a statutory right, or privilege, under a supposed valid grant, by its injunction, and that, too, in the inception of the controversy, before the merits can be finally determined. So far from its impugning the doctrine of the state court upon that subject, the same high tribunal, in the case of *Osborn v. The Bank of the United States*, (9 *Wheat.* 739,) decided at the same term, held that an injunction was properly granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges. The remarks of Chief Justice Marshall, in his opinion of that case, in pages



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841, 842, have a strong bearing in more respects than one on the case in hand.

In *The Newburgh Turnpike Co. v. Miller*, (5 *John. Ch. R.* 101,) Chancellor Kent again holds to this general doctrine, that where one has a grant of a ferry, bridge, or road, with the exclusive right of taking tolls, the erection of another ferry, bridge, or road, so near to it as to create a competition injurious to such franchise, is, in respect to such franchise, a nuisance, and this court will grant a perpetual injunction to secure the enjoyment of the statute franchise, and prevent the use of the rival establishment.

I may safely rest upon these authorities as perfectly decisive of the present application, for I know not how to distinguish this case in principle, or on what ground to place it, where it will be beyond the reach of their direct influence.

It is unnecessary, therefore, to consider very particularly another ground on which the extraordinary powers of a court of equity are sometimes invoked. It is this—that supposing the complainants have not the exclusive right to perform the duties which port wardens have been accustomed to perform, yet, being organized as a board, or public office, the defendants have no right, with the motives and intentions imputed to them and not yet denied, to establish a rival office with a precisely similar organization for doing business. That although they have adopted a different name, it is such an assimilation of their business and calling, with that of the complainants, as is calculated to mislead the public, and to produce deception and fraud. Numerous cases have occurred of that character, in which the court, both here and in England, has promptly interfered to prevent the mischief. One of the most striking is the *Omnibus case*, (2 *Keen's R.* 213,) cited by the chancellor in *Bell v. Locke*, (8 *Paige*, 76.) There an injunction was granted, and was sustained upon an appeal; to prevent the defendant from running an omnibus, having upon it such names, words and devices, as to form a colorable imitation of the names, words and devices, which had previously been placed on the omnibuses of the plaintiff, with the evident intention of obtaining a part of the

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business by misleading and deceiving the public. According to the bill of the port wardens, their case would seem to be brought within that principle. But it is not necessary to place the decision which I am now called upon to make, upon that ground. The other view of the case, which I have endeavored to present, entitles the complainants, in my opinion, to an injunction, though not to the full extent prayed for; inasmuch as the defendants, individually, have a right, in common with all other citizens, to be employed to make surveys, to appraise damages, and arbitrate whenever called upon, or requested to do so by the mutual consent of the owner, or consignee, and the domestic or resident underwriters upon vessels, or goods arriving damaged, or becoming damaged in port, where all parties in interest are present and think proper to dispense with a regular and official survey by the port wardens, and to employ them in their private capacities as citizens, or individuals, to perform the service. With this modification, or exception, the injunction must be granted as prayed for.

There is another objection, rather of form than of substance, which was taken upon the argument, and must not be entirely overlooked. The objection is, that the bill is erroneously filed in the individual names of the master and wardens, and their clerk, and that it should be in their corporate name. This objection, I think, is not well taken. They are a corporation for certain purposes, that is to say, they have a name in law by which they may sue for fines and penalties, which the law itself imposes in certain cases. But in all other cases, and in all matters of business, they are so many individuals associated together for one common object, in which they are all interested, and the income and emoluments of which are equally divided among them. They have a common benefit, and bear a common burthen as partners; and for any injury, or disturbance which affects that common interest, I can perceive no difficulty in allowing them to pursue the appropriate remedy in their own proper names.

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*F. B. Cutting*, for the appellants.

*B. F. Butler & H. S. Mackay*, for the respondents.

THE CHANCELLOR. The principal question in controversy between these parties at the time of the making of the order appealed from, has since been disposed of; by the act of March, 1844, declaring the rights, and for the relief, of the master and wardens of the port of New-York. By that act, the defendants, as well as all other persons, are expressly prohibited from performing, or exercising, or attempting to perform or exercise, any of the powers, functions, or duties of the master or wardens of the port of New-York, conferred on, or required of them by law, or by the act of February, 1819, or from receiving any fee or reward for any such service; which powers, functions and duties are declared to be exclusively vested in, and to belong to, the master and wardens of the port of New-York, by virtue of their offices. (*Laws of 1844, p. 81, § 1.*) Under that act, whatever the complainants are authorized to do by virtue of their offices, the defendants and all others are prohibited from doing, under a heavy penalty. It appears to be useless, therefore, to spend much time in examining the question, whether the powers of the complainants in this respect were exclusive before the passage of the act of March, 1844. I agree, however, with the vice chancellor, that the powers given to the complainants by the fifth section of the act of February, 1819, (*Laws of 1819, p. 13,*) were in the nature of a franchise, and in their nature exclusive, until the legislature should think proper to repeal or modify the law, or should authorize others to perform the same duties. The statute creates, or provides for the appointment of public officers, and devolves upon them certain powers and duties which the interest of the public requires should be performed by persons duly authorized and selected in the mode prescribed by the sovereign power of the state. It was a palpable usurpation of power, therefore, for another body of men to attempt, under a different name of office, to perform

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the duties assigned to these officers, and to establish a tariff of fees of office for the discharge of such duties.

I have no doubt that the chamber of commerce, and the board of underwriters of the city, would be perfectly safe persons to entrust with the selection of officers to perform these particular duties. But the sovereign power of the state had not thought proper to entrust them with that selection. They therefore mistook the duty which they owed that sovereign power, when they assumed to constitute a board of public agents, to discharge the duties which the legislature had conferred upon a board of officers to be appointed by the governor and senate.

The injunction granted in this case is too broad, however; as it protects the complainants in the enjoyment of privileges which are not conferred upon them by the act of February, 1819, and which do not therefore belong to them by virtue of their offices. Port wardens, by the common law, were not *ex officio* surveyors of damaged vessels or damaged goods. The only exclusive powers which the complainants can rightfully claim then, as surveyors, are those which are conferred upon them by statute. By the colonial act of 1761, to prevent frauds in the sale of damaged goods imported into this colony, (1 *Van Schaack's Laws*, 394,) all damaged goods sold for account of the insurers were required to be surveyed by the master or one of the wardens of the port of New-York, and to be sold at public vendue under his direction. And he was to give a certificate of such survey and sale, and was allowed certain fees for his services. Two years afterwards, the provisions of an act of 1759 were re-enacted, whereby the master and wardens of that port were by statute appointed *ex officio* surveyors for the surveying of all damaged goods brought into the port of New-York in any ship or vessel; and were, with the assistance of one or more able carpenters, to survey all vessels that should be deemed unfit to proceed to sea, and to give certificates under their hands and seals, &c. And fees were allowed them for such surveys and certificates. The act also declared that no survey on such goods or vessels, performed or made in any other manner, should be valid or authentic. (2 *Idem*, 435, § 6.) The provisions of this section

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were incorporated into the eighth section of the act of 1784, on the same subject. (1 *Greenl. Laws*, 89.) And these several powers to the master and wardens, as surveyors, were continued in the several revisions previous to the act of 1819. But in that act the words "shall be surveyors of all damaged goods brought into the said port of New-York, in any ship or vessel," which were contained in the 308th section of the revised act of 1813, (2 *R. L. of 1813*, p. 459,) were left out. In other words, so much of the previous statutory provisions on the subject of surveys as declared that the master and wardens of the port of New-York should be *ex officio* surveyors of all damaged goods brought into that port in any ship or vessel, was repealed by the legislature after it had been in force about sixty years. Whether this repeal was intentional, or merely accidental, it is not material now to inquire. It is sufficient to say that the complainants are no longer *ex officio* surveyors of damaged goods imported into the city of New-York, except in the cases specified in the fifth section of the act of 1819. That is, when such damaged goods are required to be sold by the owner or consignee, on account of such damage, and for the benefit of underwriters who do not reside in New-York. The statute does not prohibit the master and wardens from acting as surveyors in cases not mentioned in the act of 1819; and it was therefore very proper to have a tariff of fees which should apply to other surveys in case they should be made, by such master and wardens, as had theretofore been done. But the granting of a fixed rate of fees for particular services, does not, even by implication, give the complainants the exclusive right to perform such services, or interfere with the right of others to perform similar services, for such persons as may think fit to employ them.

The order appealed from must therefore be modified so as to limit its operation to the cases in which the complainants are expressly authorized to act as surveyors, judges of repairs, or in superintending sales, or in giving certificates, by the fifth section of the act of February, 1819. And neither party is to have costs against the other on this appeal.

The objection that the suit should have been in the artificial

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name in which the complainants are authorized to sue for their fees, is not well taken. The injury complained of is an injury to the complainants as individuals having a joint and common interest; and the suit was therefore properly brought in their own names.(a)

(a) Upon the argument of this case, the counsel for the appellants referred to a decision made by the Hon. Samuel R. Betts, in the district court of the United States for the southern district of New-York, on the 10th of September, 1844, in the case of *Wight and others v. Curtis*, in which some of the questions above discussed by the chancellor, were very ably examined by Judge Betts. The following is the opinion delivered by his Honor in the case referred to :

**S. R. BETTS, Judge.** In the decision of this case, I shall forbear the review of several topics discussed with great fulness and learning on the hearing. Under the construction I give the 52d section of the act of 1799, it does not become necessary to consider the origin of the powers of the port wardens of this port, or the just extent of those powers under the statutes of the state, or the conveniency or fitness of the usage, prevailing with the custom house here, to call for their official certificates in cases of goods damaged on the voyage of importation, for which a deduction of duties shall be claimed, nor to investigate and determine the right of marine surveyors, under private appointment, to perform that service.

The facts presenting the question in contestation between the parties, are, that the ship *Sheffield*, when coming into this port, in November last, and in charge of a pilot, grounded in a heavy wind and filled and sank. She was subsequently raised and towed to the city, and her cargo unladen; and by consent and at the instance of all parties interested, it was ordered by the collector to be deposited in a public store house. The dutiable goods of the plaintiffs on board the ship, were damaged by sea water on the occasion, to the amount of 60 per cent. on the value. The plaintiffs produced certificates of the port wardens of surveys of all their packages except one, and asked and had allowed them by the collector, an appraisement of the damages so incurred by those packages. In respect to the package in question, the plaintiffs offered to the collector the sworn survey and appraisement of Alexander Cartwright, (representing himself to be a person "selected by the parties interested,) to survey, appraise, arbitrate and judge of vessels and goods arriving damaged, or becoming damaged in the port of New-York," certifying that he had taken a strict and careful survey of the goods in question, and found them to have been damaged on the voyage of importation. Also the deposition, of the master of the ship, proving the wreck and injury to the cargo in consequence. An exception was taken on the argument, to the admissibility of this deposition, because the attestation was taken before a state magistrate, not authorized to administer oaths to be used in the United States tribunals. I think this objection cannot prevail, for the attestation on oath, to such a document, is not required by any act of congress; and if it was, the collector should have put his refusal to receive the affidavit, upon the ground of the defect of au-

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thority in the officer taking the oath, so that the irregularity might have been rectified at the time, and he would not be permitted to start the objection on the final argument. His acceptance of the deposition will be deemed a waiver of any informality in the jurat, particularly as the paper was addressed to him, and was to have no other operation than to guide his decision on the claim of the importer to have his goods appraised.

The collector, by his letter of Nov. 23, 1843, to the plaintiffs, stated that according to the instructions which he had received from the secretary of the treasury, the certificate of damage must be given by a port warden, and added: "that if within ten days after the landing of the goods, such certificate shall be presented, orders will be given for an appraisement." The particular certificate not being furnished, the appraisement was refused and the plaintiffs paid the full duties charged, \$103,14 on this package, making their protest at the time; and then brought this action in a state court, to recover back 60 per cent. thereof, being \$67,05, with interest from Nov. 25, 1843. The action was removed to this court pursuant to the act of congress of March 2, 1833. A letter of the secretary of the treasury, dated July 13, 1843, to the collector, ratified his decision in a previous case, rejecting the certificate of damage given by the marine surveyors appointed by the chamber of commerce and board of underwriters of the port of New-York, and approved the practice of requiring the certificate of damage to be given by the port wardens; as being not only in accordance with the 52d section of the act of 1799, but as that which most nearly conforms with its provisions.

Some criticism was made, upon the argument, as to the proofs of damage: and their sufficiency to establish the fact, was questioned. But as the objection on the trial referred essentially to their admissibility, and the fact and extent of damage was not made a prominent point, I shall regard the testimony, if competent, sufficient to have justified the jury in finding for the plaintiffs. And the court, on a case made, will draw the same inferences from the evidence a jury would be warranted in drawing. (14 *Johns*. 215, 216. 15 *Id.* 409, 6 *Cowen*, 632.) It was also suggested, that the collector rightfully refused the request of the plaintiffs, because they asked the appointment of merchant appraisers, conformably to the act of 1799, when the act of 1823 had abolished that mode of appraisement, and designated official appraisers who alone possessed authority to make the appraisement. This was clearly a mere misapprehension in the form of application, a mistake which the collector does not regard, for he avowed his readiness to act under the application, on being furnished the particular certificate he required; and accordingly the error of the plaintiffs in the designation of the appraising officers can stand in no way against the rights in the matter. The court will regard it as the collector did, a request to have the appraisement made conformably to the law. The essential question to be disposed of, is then, whether the plaintiffs, on the facts and circumstances of this case, were bound to produce a certificate of the port wardens, before the appraisement and a deduction of duties because of such damages could be claimed by them.

This inquiry turns upon the construction to be given to the 52d section of the act of March 2, 1799. It enacts that all goods, wares and merchandize of which entry shall be made incomplete, or without the specification of particulars, either for want of the original invoice or invoices, or for any other cause, or which shall have received

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damage during the voyage, to be ascertained by the *proper officers* of the port or district in which the said goods, wares or merchandize shall arrive, shall be conveyed to some warehouse or storehouse to be designated by the collector, in the parcels or packages containing the same, there to remain with due and reasonable care, at the expense and risk of the owner or consignee, under the care of some *proper officer* until the particulars, cost or value, as the case may require, shall have been ascertained, either by the exhibition of the original invoice or invoices thereof, or by appraisement at the option of the owner, importer or consignee, in manner hereafter provided, and until the duties thereon shall have been paid or secured to be paid, and a permit granted by the collector for the delivery thereof. And for the appraisement of goods, wares and merchandize not accompanied with the original invoice of their cost, or to ascertain the damage thereon received during the voyage, it shall be lawful for the collector, and upon request of the party he is required, to appoint one merchant, and the owner, importer or consignee to appoint another, who shall appraise or value the said goods, wares or merchandize accordingly: which appraisement shall be subscribed by the parties making the same, and be verified on oath or affirmation before the said collector: which oath or affirmation shall be in the form following, to wit, &c. The usage at the custom house under this section, has always been to exact a certificate preliminary to ordering an appraisement on damaged goods, and the wardens of the port have been held the "proper officers" to give said certificate.

On the part of the plaintiffs, it is contended that the act contains no authority for either of these requirements. The section recited, directs goods, wares and merchandize to be conveyed to some warehouse or storehouse on arriving in port in either of two conditions, (1) when the entry of these shall have been made incomplete for any cause, and (2) which shall have received damage during the voyage, to be ascertained by the "proper officers," &c. In the first instance, it is plain, the collector acts on his own view of the state of the entry, and without any extraneous evidence; but as in the second instance, the cause for ordering the goods to a public store could not be apparent in the entry, or one which the collector would be supposed prepared to decide on his own inspection, there would seem to be the occasion for designating by law the circumstances which would require or authorize the order. This designation is supposed to be supplied by the statute. The terms of the act may probably admit this construction, and if the first clause is read by itself, such might be its more natural interpretation, because the inquiry which is to lead to the action of the collector, is whether the goods have received damage during the voyage, and the expression "to be ascertained by the proper officers," might well be regarded as having reference to the general proposition or idea of "damage during the voyage," and not to damage simply in respect to its amount or extent. But the same expression is taken up in the subsequent clause of the section, and congress, by the application of it there, would seem to regard the language as calling for a valuation of damages, and not merely the finding the fact that damage had been received. This understanding of its import, is again distinctly indicated in the form of the oath, for the appraisers are required to swear that "the packages have received damage, as we believe, during the voyage of importation, and that the allowance by



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is made, the such damage, is to the best of our skill and judgment just." It is not to be supposed that congress would in this clause and in the oath impose on appraisers the duty of ascertaining the fact of damage during the voyage, if, by the previous clause, other officers were appointed to perform that very service; and it seems to me that the entire section, taken with the form of the oath, denotes that it was intended to provide for no more than one ascertainment of damage in this behalf, and that in this respect, the first clause in the section is to be considered subordinate to, or more completely fulfilled by the subsequent one. Although the language may be susceptible, and most naturally, of the interpretation given it by the collector and the secretary of the treasury, yet plainly no violence is done it by understanding it in the other sense, and the latter would most effectually harmonize all the provisions of the section. In aid of this exposition, it is to be observed that the language is prospective, having relation to an act afterwards to be done, and that not necessarily before the action of the collector in ordering the goods to a public store. "Damage to be ascertained," and "to ascertain the damage," are correlative expressions, and indicate one and the same procedure; and that they are so used by congress, is plainly imported by the terms of the oath "to ascertain and appraise the damage." This latter act must necessarily follow the deposite of the goods in a public store, and the language of the first clause may very well be satisfied, even on the interpretation of the defendant, by having the survey posterior to the deposite in store. If then this ascertainment of damages by proper officers, must not indispensably be had, previous to the deposite of the goods, and as the statute provides for only one proceeding thereon subsequent to such deposite, the entire section would most appropriately be read as having reference to the one act of ascertaining and appraising, designated and directed in the latter clauses. I think, therefore, that upon the true construction of the 52d section "the damage received during the voyage, to be ascertained by the proper officers of the port or district," mentioned in the first clause, is the same matter directed to be inquired into and determined in the after branch of the section, and that accordingly there is no authority in the act for requiring any other survey or appraisal.

A more minute analysis of the terms of the section will conduce to the support of this construction. If the provisions of the first clause call for a survey of the goods by proper officers, as it is understood at the custom house, it stands in singular contrast with the after provision in that respect, in not naming the officers who are to perform the duty, in not exacting the sanction of an oath from them, and in not rendering it obligatory on the collector to take the proceedings. The importer is supplied with no authority to compel the action of the collector, and if the first branch of the section is read as complete within itself, it would seem that the merchant is placed entirely at the discretion of the collector, or can have no relief because of the deterioration of his property, unless through the tedious and precarious prosecution of the collector for malfeasance in his office. Congress deemed the matter worthy precise legislation, when they came to consider the equitable consequences of such injury to goods, on the rights of the importer and the interests of the revenue, and provided specifically for enforcing and preserving these respective interests. Such incongruity would be reluctantly implied in the provisions of the same section, and the construction, therefore, which regards the whole subject matter as one and the

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same, and as provided for in a common regulation, seems best adapted to uphold the rights of all parties, and fulfil the obvious purpose of congress. This same course is pursued in the sixtieth section in relation to vessels coming into port in distress. The regulation is minute and specific as to terms and manner in which kindred services are to be obtained and rendered, and whether state officers or merchant assessors are employed, the act points out definitively when and how they are to act. This latter section supplies also a forcible argument against the application of the term "proper officers," used in the fifty-second section, to port wardens, because the 60th section names them, and if there are no port wardens it calls for other state officers usually charged with and accustomed to ascertain the condition of ships or vessels arriving in distress.

It is not to be supposed if congress adopted, in the previous section, "port wardens," under the general appellation of "proper officers," as well known to possess and exercise within the states the functions there called for, that in legislating further on like subject matters, they would, in the sixtieth section, name them specifically, or describe the qualifications of the other officers who might be used. But it is to be remarked that the term "proper officers," is twice used in the same paragraph of the fifty-second section, and in the latter case must necessarily refer to some custom house officer, or one appointed under the authority of the revenue laws, because he is officially to take care of the goods ordered by the collector to be placed in store. It is not unworthy of observation that the phrase "proper officers" of the port or district in which the goods, &c. shall arrive does not apply to any public officers known to the laws of this state at the time the act of congress was passed, nor is it probable that such officers were created in any of the other states. The powers of port wardens do not, under the colonial or state statutes, extend beyond the port of New-York; (*Act March 7, 1759, 2 Smith & Livingston, 160; Act 14th April, 1784, 1 Greenl. 86;*) whereas the district of New-York was by the fifth section of the act of congress of March 2, 1799, (as it had been by the act of July 31, 1789,) made to embrace nearly all the coasts, rivers, bays and harbors of the part of the state, including those of the North river. The city of New-York is, in the act of 1789, and all subsequent ones, made the port of entry; but it is manifest that there must be officers created under the acts, whose powers extend over the entire district. It may be as important to have proper officers of the revenue in other harbors on the coast within the district to take care of goods deposited there by the collector, as in that of New-York. And it may become of equal importance to have appraisements made at such places; because the whole regulation has reference to wrecks or disasters at sea, and will necessarily be ample enough to meet the exigencies that are likely to arise in this behalf in every port of the district.

Again, the argument in favor of construing the fifty-second section so as to have the expressions "proper officers of the port or district" apply to port wardens, rests upon the assumption that that class of officers notoriously possessed and exercised, under the state laws of the different states, the power of making surveys of goods alleged to be damaged on the voyage of importation, and determining the fact whether such damage had been received. There may be ground to doubt the entire correctness of this assumption. By the colonial act of March 7, 1759, § 9, the master

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and wardens of the port of New-York, for the time being, are appointed surveyors, for surveying all damaged goods brought into the said port in any ship or vessel, and in like manner, with the assistance of one or more able carpenters, to survey all vessels deemed unfit to proceed to sea, &c. (2 *Smith & Liv. Laws*, 163.) An act was passed September 11th, 1761, with a preamble that, "whereas goods imported here, and insured in Great Britain and elsewhere abroad, are sometimes sold in this city for the account of the insurers, and some persons taking the advantage of their absence, have frequently made fraudulent sales, to the great prejudice of the insurers, the undue gain of the assured, and detriment of the commerce of this colony; for a remedy, therefore, it is enacted that, hereafter, all damaged goods to be sold for account of the insurers, shall be surveyed by the master or one or more of the wardens of the port of New-York for the time being, and such sale shall be made in his or their presence," &c. (*Van Schaick's ed. Laws N. Y.* 394.) This act was continued in force to January 1, 1775. (*Idem*, 498.) If this act is to be regarded as suspending or superseding that of 1759, during its continuance or its expiration, the latter probably revived, and under the thirty-fifth article of the constitution of April 20, 1777, continued in force until the passage of the act of April, 1784, by the state legislature. The eighth section of the latter act is a re-enactment of the ninth section of the act of 1759. (*Jones & Varick, Laws N. Y.* 122. 1 *Greenl.* 89.) The latter law, in substance, was continued under the various revisions of the statutes, till a revision and consolidation of the laws on this subject by the act of February 19, 1819. (5 *Laws N. Y.* 11.) By the fifth section, it is enacted that the master and wardens of the port of New-York, or any two of them, with the assistance of one or more skillful carpenters, shall be surveyors of any vessel deemed unfit to proceed to sea, &c. and in all cases of vessels and goods arriving damaged, and by the owner or consignee required to be sold at public action, on account of such damage, and for the benefit of underwriters out of the city of New-York. Such sale shall be made under the inspection of the master and wardens, or some or one of them, which master and wardens shall, when required by the owner or consignee aforesaid, certify the cause of such damage, &c. and an after clause gives them \$1,50 for each and every survey on board of any ship or vessel, or at any store or along the docks of the city of New-York, on damaged goods, &c. This is, in substance, a re-enactment of the provisions of the colonial law of 1761, and the language of the section clearly indicates it was based upon like reasons: and as the existing laws of 1784, must necessarily have been in view of the legislature, the implication is strong, if not conclusive, that the latter act was introduced to limit the authority of port wardens in making surveys of damaged goods to the single case therein designated.

I am aware the vice chancellor in this circuit has put a different construction upon the act of 1819, and has held, from the grant of fees for surveys on damaged goods, that the intention of the legislature to make the powers of port wardens the same as they had been under the act of 1784, is to be implied. This decision it is understood is in course of review before the chancellor; and it is not, therefore, to be regarded as authoritative on the point. And, with great respect for the learning and judgment of the distinguished judge who pronounced the opinion referred to, I

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think it must be, at least, matter of doubt, whether so important an interpretation to the act of 1819, can be authorized, upon the presumption afforded by the mere grant of fees ; inasmuch as that provision may be reasonably satisfied by applying it to the particular surveys designated by the section. It is enough, however, in the case before me, to say that it is not made clear, by the laws of the state, that the port wardens are now possessed of authority to make surveys on all damaged goods brought into this port in any vessel, and certify the cause of such damage, and that accordingly, if congress intended to refer this service to state officers, the defendant fails to show that port wardens are "the proper officers of the port or district" competent to perform such services. But it is to be furthermore observed, that on the construction of the fifty-second section contended for by the defendant, a preliminary survey and certificate by port wardens can only be necessary for the purpose of guiding his discretion in ordering the goods to be deposited in a warehouse or storehouse. It is not urged that the port wardens have any authority to ascertain and appraise the damage ; and there is nothing in the section importing that after the collector, for either cause indicated therein, has commanded the deposit of goods, that he can do less or more respecting them than pursue the precise directions of the act. The act is express and explicit in declaring that when the condition exists requiring the goods to be conveyed to a warehouse or storehouse, they shall remain there until the particulars, &c. shall have been ascertained in the manner afterwards provided in the same section.

It seems to me clear, therefore, that if the collector might under the act exact the certificate of a proper officer, on survey of the goods, before he would order their deposit in public store, because of damage incurred on the voyage of importation, yet that if he act upon the assumption of such damage, and orders the deposit for that cause, he is then bound to proceed and have the damage ascertained and appraised by the public appraisers, who by the act of 1823, supersede in this behalf the authority of merchant appraisers referred to in the fifty-second section. I am accordingly, of opinion that the plaintiffs are entitled to judgment on the verdict.

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MAYER vs. SALISBURY and others.

Where a prior incumbrancer is obliged to appear in a foreclosure suit, in order to protect his rights, he is entitled to the necessary costs of his appearance ; to be first paid out of the proceeds of the sale under the decree.

THE bill in this case was filed to foreclose a mortgage ; and the defendant Packard had a lien upon the premises as a purchaser at a tax sale, the time for redemption not having yet expired ; which lien overreached, and was entitled to priority over the complainant's mortgage.

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*J. Rhodes*, for the defendant Packard, asked for his costs of appearing to protect his prior lien.

*J. J. Hill*, for the complainant.

The CHANCELLOR said that where a prior incumbrancer was made a defendant, in a foreclosure suit, he was entitled to his costs of appearing to protect his rights; and that the necessary costs incurred by him for that purpose should be first paid out of the proceeds of the sale of the mortgaged premises.

Decree accordingly.

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THE OSWEGO FALLS BRIDGE COMPANY vs. FISH and others.

[Explained, 3 Sandf. Ch. 658.]

Where an act of the legislature, incorporating a bridge company, left it to the discretion of the commissioners, appointed by such act, either to purchase and repair an existing bridge, or to erect a new one at some other point on the river; *Held*, that the court of chancery had no power to control the exercise of that discretion; in the absence of proof that it had been exercised corruptly, or dishonestly, by the commissioners.

The grant to a corporation of the right to erect a toll bridge across a river, without any restriction as to the right of the legislature to grant a similar privilege to others, does not deprive a future legislature of the power to authorize the erection of a free bridge across the same river, so near to the first as to divert a part of the travel which would have crossed the river on the first bridge if the last had not been erected.

THIS was an appeal from a decree of the vice chancellor of the fifth circuit, dismissing the complainants' bill with costs. The object of the bill was to restrain the commissioners appointed by the act of April, 1838, to build a free bridge across the Oswego river, between the falls and the north line of the village of Fulton, from proceeding to erect such bridge.

The following opinion was delivered by the vice chancellor:

GRIDLEY, V. C. Upon an attentive consideration of the facts of this cause, I cannot see any distinction between the principle

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involved in it and the principle upon which the *Charles River Bridge case*, (11 *Peters*, 42,) was decided. It would be an act of pedantry for me to go into a consideration of the reasons for the decision, after the full and elaborate discussion of them by the judges whose opinions are reported at length in that cause. I feel bound to say, under the decision in that case, that the act under which the defendants were proceeding, when arrested by the injunction, are valid. A distinction is attempted, by the learned counsel for the complainants, that the public interest required a new bridge to be built on Charles river, but that in this case it is apparent from the facts that this public interest will not be promoted by the erection of a free bridge. I think, however, if the legislature have a right to authorize the building of a free bridge when the public interest demands it, *they* are of necessity the judges of the fact whether it is demanded by the public interest or not. And after the passage of the act, that is no longer an open question. It is also insisted that the commissioners are bound, by the 7th section of the act appointing them, to purchase and appraise the Oswego Falls bridge, instead of building a new bridge, provided it can now be established that the public interest would be promoted by it. It seems to me, however, that the commissioners have a judicial discretion vested in them, either to build or purchase; and in the exercise of that discretion this court cannot revise their acts except in case of very gross abuse of such discretion, if at all. (*See 19 Wend. 56.*)

*T. Jenkins*, for the appellants.

*H. Spencer*, for the respondents.

THE CHANCELLOR. The question whether the commissioners should purchase and repair the bridge of the complainants, or erect a new bridge at some other point on the river, was one which was left by the legislature to the discretion of the commissioners. And this court has no power to control the exercise of that discretion. There is no pretence, in this case, for charging the defendants with a corrupt or dishonest exercise of

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their powers in this respect. The only question, therefore, is whether the legislature had the right to authorize the erection of a free bridge, across the Oswego river, so near to the bridge which the complainants had erected, under their charter, as to diminish their tolls and materially impair the profits of the company. I had occasion, incidentally, to consider the power of the legislature in this respect in the case of *The Mohawk Bridge Company v. The Utica and Schenectady Rail-Road Co.* (6 *Paige's Rep.* 554,) and I then came to the conclusion that the grant to a corporation to erect a toll bridge across a river, without any restriction of the power of the legislature to grant a similar privilege to others, would not deprive a future legislature of the power to authorize the erection of another bridge which would divert a portion of the travel from the bridge which had been previously erected. Since that decision we have been furnished with the reported case of *The Charles River Bridge Co. v. The Proprietors of the Warren Bridge*, (11 *Peters' Rep.* 420,) decided by the supreme court of the United States a few months before, but not then reported. That case cannot be distinguished in principle from the present; and as the question was fully considered there, in the very able opinion of Chief Justice Taney, who delivered the judgment of the court, it would be useless to go over the same ground.

The decision of the vice chancellor was therefore right in this case; and the decree appealed from must be affirmed with costs.

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TURNER vs. PECK.

In April, 1829, W., the owner of a state certificate, which entitled him to a patent for a village lot in East Oswego, upon the payment of \$30, which remained due to the state for the purchase money, sold and conveyed the north half of the lot to A. C., with warranty; and the conveyance was recorded on the 15th of August, in the same year; and the grantee in that conveyance conveyed that half of the lot to P., who subsequently conveyed it to the complainant; and the day before the recording of the conveyance to A. C., the holder, of the state certificate assigned it to G. and C., together with a contract which he had made with D. for

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the sale of the southwest quarter of the lot. And they gave back to him a covenant, that whenever they should obtain the patent from the state, they would convey the southwest quarter of the lot to D., with warranty, and would convey the residue of the lot to W., by a quit-claim deed; and subsequent to the recording of the conveyance to A. C., for the north half of the lot, W., by an endorsement on the covenant of G. and C., sold to the defendant all his right, title, and claim to the land mentioned in that covenant, for a valuable consideration; G. afterwards assigned his interest in the state certificate to C., who obtained a patent for the whole lot, in his own name; and subsequently conveyed to the defendant all the lot, except the southwest quarter which was contracted to be sold to D.; under which last mentioned conveyance the defendant subsequently claimed title to the north half of the lot, as well as to the southeast quarter thereof to which he was entitled as the assignee of the covenant of G. and C. Upon a bill filed by the complainant, to compel the defendant to execute a quit-claim deed to him of the north half of the lot; *Held*, that by the conveyance by W. of the north half of the lot, to A. C., the \$30. due to the state for the unpaid purchase money, became primarily chargeable upon the south half of the lot; and that the contract with D. entitled him to the southwest quarter, subject to the payment of the purchase money due upon that contract; that as between D. and W., as well as between the latter and A. C., the \$30 due to the state was a charge upon the purchase money due from D. on his contract with W.

*Held further*, that by the assignment of the state certificate from W. to G. and C., they took no beneficial interest in the north half of the lot, nor in the southeast quarter thereof. But that the legal effect of the assignment of the state certificate, and of the covenant from G. and C. to W., to quit-claim the other three quarters of the lot to him, was that, upon obtaining the patent from the state, they were bound to convey three fourths of the lot to him absolutely and unconditionally. And as to the southwest quarter, they were to convey it to D. upon his complying with the terms of his contract; and to receive and retain the purchase money due upon that contract to reimburse them for the \$30 which they were to pay to the state. And that if D. did not comply with his contract they would be entitled to that quarter of the lot for their own use and benefit.

*Held also*, that the only equitable right which W. had in the lot, under the covenant of G. and C., at the time of this assignment to the complainant, was the right to an absolute conveyance, for his own benefit, of the southeast quarter of the lot, as soon as a patent should be obtained from the state. And that the defendant took the assignment of W.'s right to a quit-claim deed, under that covenant, subject to the previous right of A. C. to the north half of the lot under the previous conveyance by W. with warranty.

*Held further*, that C., the patentee of the state, took the legal title to the north half of the lot, by virtue of the patent, in trust for the complainant's use and benefit; such being the effect of the covenant of G. and C. in connection with the conveyance with warranty to A. C. under and through which the complainant had obtained his equitable right to that half of the lot. And that the conveyance of that part of the lot to the defendant being without consideration, the latter was not entitled to hold it as against the complainant's equitable right.



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THIS was an appeal, by the defendant, from a decree of the vice chancellor of the fifth circuit. In April, 1829, J. Whaley, the father-in-law of the defendant, owned a state certificate which entitled him to a patent for lot No. 213, in East Oswego village, upon the payment of \$30, which remained due to the state for the balance of the purchase money. And on the 27th of that month, he sold and conveyed to Adeline Clark the north half of the lot, by deed with warranty; which conveyance was duly acknowledged, and on the 15th of August, in the same year, was recorded in the office of the clerk of the county in which the premises were situated. Miss Clark was assessed for the north half of the lot for the year 1829, and exercised acts of ownership over the same; but the witnesses did not agree as to the fact whether her half of the lot was actually enclosed. In the spring of 1830 she married J. D. Shuart; and she and her husband conveyed the premises to L. Palmer, who conveyed to the complainant. On the 14th of August, 1829 Whaley assigned the state certificate to G. and C. Woodruff, together with a contract, which he had made with O. Davis for the sale of the southwest quarter of the lot. And they, at the same time, gave back to him a covenant, under their hands and seals, by which they agreed, whenever they should obtain the patent from the state, to convey the southwest quarter of the lot to Davis, with warranty, upon his complying with the conditions of his contract; and that they would convey the residue of the lot by a quit-claim deed to Whaley. In June, 1830, Whaley, by an endorsement upon the contract, or covenant, of G. and C. Woodruff, under his hand and seal, but neither witnessed nor acknowledged, sold to his son-in-law, the defendant, all his right and title or claim to the land for which he was to have a quit-claim deed by virtue of that contract, in consideration of thirty dollars. G. Woodruff afterwards assigned his interest in the state certificate to C. Woodruff. The latter obtained a patent for the whole lot, in his own name, a few days previous to the fifth of September, 1834; and on that day he conveyed to the defendant all the lot, except the southwest quarter which was contracted to be sold to Davis. No considera

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tion was paid for this conveyance, by the defendant; but Woodruff conveyed to him because he claimed the conveyance as assignee of the covenant given to Whaley in August, 1829. Under this conveyance the defendant subsequently claimed title to the north half of the lot, as well as to the southeast quarter thereof, to which he was entitled as the assignee of the covenant of G. and C. Woodruff to Whaley. And he having refused to execute a quit-claim deed of the north half of the lot to the complainant, the latter filed his bill in this cause to obtain such conveyance. The cause was heard upon pleadings and proofs, and the vice chancellor made a decree according to the prayer of the bill. From this decree the defendant appealed to the chancellor.

The following opinion was delivered by the vice chancellor:

GRIDLEY, V. C. Whaley, while holding the certificate of the whole lot, (the north half of which is in question in this suit,) conveyed, for good considerations, the said north half, by warranty deed to Adeline Clark; and she and her father went into possession of, and occupied, the premises in question for a time; after which she was married, and finally removed with her husband. From this source the complainant, by several mesne conveyances, derives his title to the lot. After the giving of this deed to Miss Clark, and before it was recorded, and while Miss Clark and her father were in possession of the premises, Whaley assigned the certificate to the Woodruffs, under a condition, if they should get a patent, to convey to him, Whaley, all the lot, except the southwest quarter thereof which was contracted to be sold to one Davis, by quit-claim deed. On the 8th June, 1830, W. assigned his right and title to this land, and to this contract of the Woodruffs, to the defendant. In 1834 C. Woodruff obtains a patent and deeds to Peck as the assignee of Whaley. My opinion is, that Peck must be deemed to hold this land as trustee for the complainant, the real owner. Whaley has no right nor title to these premises, and conveyed none to the Woodruffs, for two reasons; 1. It was only an equitable interest, or chose in action, and the purchasers took it subject to all the

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equities in the hands of the original owner, Whaley. 2. The possession of Miss Clark, independent of the recorded deed, was legal notice of her interest. For the first of these reasons, and I think, from a fair view of the evidence on the subject of possession, for the second also, Peck took no interest in the premises by virtue of the assignment of Whaley. And for a third reason also; which is, that Whaley did not assume, or profess to sell, or assign any thing but his own right and title; or this equitable interest, which clearly carried nothing more than his actual interest after Miss Clark's north half was deducted. He did not own a particle of interest in the north half; and the assignment therefore conveyed nothing. Suppose Whaley's interest, whatever that was, did, in form, pass to Peck. For the reasons aforesaid, Peck took it subject to all the equities connected with it while in Whaley's hands. In other words, it being a chose in action, Peck did not take it discharged of its equities as he would have taken a promissory note for value; but he took it liable to all such equities, as he would have taken a bond, or any other chose in action. Whaley, before this assignment to Peck, held an interest in the land which, when he should receive it from Woodruff in the shape of the legal estate, would belong, at once, to Miss Clark, or her grantees, to prevent circuitry of actions. And he would have been estopped from denying Miss Clark's title. (9 *Cowen*, 18. 14 *John*. 194. *Co. Lit.* §§ 446, 265, *a. b.*) Peck got Whaley's interest, subject to this equity; and when that interest issued into the legal estate by the patent and deed from Woodruff, it was still the same interest in the new shape of legal title, and Peck is liable to have Miss Clark's rights enforced against him, just as Whaley would have been. I have said that Whaley did not even assume to assign any thing but his right and title; which would exclude Miss Clark's lot. I am inclined to think, also, that the defendant could never have regarded Whaley as selling more, or himself as buying more. Such a supposition would impute a high offence to Whaley, even if the object was to defraud Miss Clark. The possession and occupancy of Miss Clark was notorious, and her deed on record. Would Whaley assume that Peck, his friend and

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neighbor, was ignorant of this; and thus seek to commit a double crime, by defrauding him? Peck had every opportunity to know how the fact was; since every person, and the whole neighborhood, was aware of it. The consideration was wholly inadequate; and it does not appear, with sufficient clearness, that even the small notes in addition to the \$30, were taken up by Peck; or if so, as any part of the consideration of this assignment. The answer on this point is not as positive. There must be an order that Peck cause the title to be conveyed to the complainant free from incumbrances, as he received it from Woodruff; and he must pay the costs of this suit.

*C. Stevens*, for appellant. The testimony is not sufficient to show a possession at any time by Miss Clark; and if otherwise, there is no evidence to show such possession as is, in equity, constructive notice, at the time when Peck purchased from Whaley; or at any period subsequent thereto, and prior to the acquisition by the defendant of the legal title. The record of Whaley's deed to Adeline Clark is not constructive notice to the defendant; because the interest thereby acquired, being a right under an executory contract for the sale of lands, is one not required to be recorded, and the record of which has no effect. Because such record, if in any respect proper, could only bind subsequent purchasers of the same equitable interest from the same grantor; and the defendant claims, not as a subsequent purchaser from Whaley, but by a paramount title. Because the deed was not recorded until after Whaley had parted with his whole equitable interest. The defendant had not actual notice. 1. He denies it in his answer. 2. It is disproved by the complainant's own witness. 3. Notice, here, amounting to fraud, the proof should be strong. 4. Not a single witness swears to it. 5. The presumptions relied on are worthless, or at best very slight, and Peck being a purchaser, this is not a case for presumptions. 6. It is very probable that there was no equity to give notice of. The defendant is a purchaser for a valuable consideration; if for a precedent debt, that would be sufficient; but the fact is otherwise, and the answer on this point being re-

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sponsive to the bill and uncontradicted, is conclusive. The defendant being a purchaser for a valuable consideration, and without notice, either actual or constructive, he will not be disturbed in equity—1. Because he has a higher equity than the complainant. 2. Because he has the legal title. Though Peck had notice, yet if the Woodruffs had not, he is protected by the conveyance of the latter.

*W. F. Allen*, for respondent. I. The defendant acquired no rights under the deed from C. Woodruff to which he was not entitled under the assignment from J. Whaley; and we must resort to that assignment to ascertain his rights. Woodruff had nothing to convey, except the interest of Whaley. He stood as the trustee of Whaley as to all the lot, except the southwest quarter contracted to Davis. Woodruff's impression, at the time of his examination as a witness, was, that on the contingency that Davis did not pay up for his quarter, the whole lot was to belong to him. This he only states as an understanding, and is contradicted, 1st, by the language of the instrument itself, and which must govern; and 2d, by the admissions of Woodruff himself, as proved by Joseph D. Shuart, and which, if defendant claims under him, are binding upon him. For it is well settled, that a representative is bound by the admission, as well as by other acts, of the person whom he represents; and this includes all derivative interests; (*Gresl. Eq. Ev.* 355;) and that the declarations of a person under whom one of the parties claim title by a conveyance made subsequent to the declaration, are evidence for the adverse party. (*Varick v. Briggs*, 6 *Paige's R.* 323; *S. C.* 22 *Wend.* 543. *Park v. Peck*, 1 *Paige's R.* 477. *Cowen & Hill's Notes to Phil. Ev.* 663 to 669, and authorities cited, note 481.) There was no consideration for the deed, aside from the assignment from Whaley to the defendant, and the consideration by which it was supported. C. Woodruff conveyed to defendant in fulfilment of the contract of G. & C. Woodruff, of which defendant claimed to be the assignee. The defendant cannot, therefore, claim to be a purchaser in good

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faith and for a valuable consideration, from C. Woodruff; but he must resort to the assignment from Whaley.

II. The defendant, by the assignment from Whaley, acquired no title to the north half of the lot, nor any rights, interests or equities therein. Whaley had no title to that part of the lot, or any rights, interests or equities therein, which he could convey. Although Whaley, at the time of the conveyance to Miss Clark, had not a perfect title to the lot, still he had a legal interest therein, by virtue of the state's certificate, and had, in fact, a title thereto, subject to the lien of the state for the unpaid purchase money, \$30; and by the conveyance, Miss Clark acquired a valid equitable title to that part of the lot in question, subject to that lien. In *The Atty. General v. Purmort*, (5 Paige, 626,) Purmort had contracted to purchase certain premises of McCrea for \$2,000, and afterwards mortgaged them to the state. It was held that the equitable interest of Purmort was thus conveyed to the state; and that the purchaser under the foreclosure acquired a valid equitable title, subject to McCrea's lien for the purchase money. Whaley, then, was concluded by his grant, and had parted with all his title to that part of the lot to Miss C., and was the mere trustee for her so far as the formal paper title might remain in him. It is therefore within the principle laid down by the chancellor in *Parks v. Jackson*, (11 Wend. 447;) that if the whole purchase money has been paid on a contract before the recovery of a judgment against the vendor, the vendee will be a trustee for the purchaser; and the purchaser at the sheriff's sale would hold it upon the same trusts. Whaley having conveyed by warranty deed, was so far concluded by that conveyance, that any title afterwards acquired by him would enure immediately to the benefit of Miss C. and her assigns, without any new or other conveyance. This principle is familiar, and is held in *Sweet v. Green*, (1 Paige's R. 473.) This trust in Whaley was a prior passive trust, and Miss Clark was entitled to the actual possession of the premises; and was so entitled on the 1st day of January, 1830, the day on which the revised statutes took effect as law; which was before the defendant procured the assignment from Whaley. The revised

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statutes then vested the legal title in Miss C., so far as it could vest ; and it could and did so vest as against the world, save only the state and its lien for the purchase money. Neither Whaley, who had conveyed with warranty, nor any person claiming under him, can say the title did not vest in Miss C. They are estopped from setting up an outstanding title. By 1 R. S. 722, § 47, 2d ed. it is provided that every person who, by virtue of any grant, assignment or devise, now is, or hereafter shall be, entitled to the actual possession of lands, &c., shall be deemed to have a legal estate therein of the same quality, &c., as his beneficial interest. The chancellor, in commenting on this section, says, that in all cases of passive trusts the revised statutes have vested the legal estate in the person entitled to the actual possession. (*Cushing v. Henry*, 4 *Paige's R.* 345.) That this is a passive trust, we suppose there is no doubt ; the property being, at most, simply vested in Whaley upon trust for another, and the nature of the trust being left to the construction of law. (*Lewin on Trusts*, 214. *Kent's Com.* 309.) If Whaley had intended to convey the north half of the lot, and had executed a proper instrument for that purpose, still, under the circumstances of this case, the defendant acquired no title to it. It is provided by statute, (1 R. S. 2d ed. 731, § 143,) that no greater interest shall be construed to pass by any grant or conveyance hereinafter executed, than the grantor possessed at the delivery of the deed, or could then lawfully convey, except that every grant shall be conclusive against the grantor and his heirs. This assignment was executed after this section became a law ; and if it is applicable to the case, then certainly nothing passed to the defendant in respect to the north half of the lot. For Whaley had no estate or interest in the north half of the lot at the time of the execution of the assignment, and could lawfully convey none. Whatever may have been the intention of the parties, the instrument executed by Whaley to the defendant did not, in terms, or by any fair construction, convey the north half of the lot. If such was the intention of the parties, and they could do it, they failed to take the necessary steps to effect that intention.

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III. The defendant is estopped from denying the validity or effect of Miss Clark's deed. If we have taken a right view of the case, the defendant must claim under Whaley. If so, then he is concluded by Whaley's deed to Miss C. Every grant shall be conclusive as against subsequent purchasers from such grantor, *except* a subsequent purchaser in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first recorded. (1 *R. S.* 2d ed. 731, § 144.) And this section is applicable, whether the defendant claims directly from Whaley, or indirectly through Woodruff. Then Woodruff must hold as purchaser from Whaley, and was concluded by the deed, and had no title to convey to the defendant.

The only question then to be determined is, whether the defendant comes within the exception to the statute; for if he does not, then it is conclusive. And we insist that he does not come within any part of the section. He is not a purchaser in good faith. In order to constitute him a purchaser in good faith, he must have been not only innocent of any intent to defraud, but he must not have had any notice, actual or constructive, of the rights of Miss Clark, and must also have been entirely ignorant of every circumstance which should have put him upon inquiry. And Miss Clark was in possession of the premises at the time of and before the defendant's purchase. If the vendee is in possession of lands, under a contract to purchase, a subsequent purchaser has constructive notice of his rights. (*Gouverneur v. Lynch*, 2 *Paige*, 300.) A purchaser of real estate cannot claim the same as a bona fide purchaser, as against the equitable rights of a third person who at the time of such purchase was in the actual possession of the premises, claiming to be the owner. (*Spafford v. Manning*, 6 *Paige*, 383. *Grimstone v. Carter*, 3 *Id.* 421.) The deed to Miss Clark was constructive notice to the defendant, and deprived him of the character of a bona fide purchaser. (*Per Curiam*, *Jackson v. Post*, 15 *Wend.* 594.) In addition to this, notice may be inferred from the other circumstances of the case, the general notoriety of the holding and occupancy of Miss Clark, and the defendant's living in the same village. And the fact that the lot was assessed to her is evidence



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of the notoriety ; and the relation existing between the defendant and Whaley adds force to the presumption that the defendant had notice of Miss Clark's rights. Actual notice need not be shown. Courts will protect the rights of third persons, when there are circumstances which should put a purchaser upon inquiry. (*Tuttle v. Jackson*, 6 *Wend.* 613. *Pendleton v. Fay*, 2 *Paige*, 202.) And in some cases the courts will infer notice. (*Anderson v. Van Alen*, 12 *John.* 343.) He was not a purchaser for a valuable consideration. The only consideration of which the court has any certain evidence, or any thing upon which they can rely, is the \$30 mentioned in the assignment ; and that was for a precedent debt, which does not constitute a valuable consideration. (*Dickinson v. Tillinghast*, 4 *Paige*, 215. *Grimstone v. Carter*, 3 *Id.* 421.) His conveyance was not first recorded. On the contrary, Miss Clark's deed was recorded before the defendant's pretended purchase.

IV. The conveyance to the defendant from Whaley, if by that it was intended to convey the north half of the lot, or any interest in it, was void by reason of the adverse possession of Miss Clark. That Miss Clark, or she and her husband J. D. Shuart, were in the actual possession of the premises on the 8th June, 1830, is amply proved ; and that she claimed adversely to the defendant there is no doubt. By 1 *R. S.* 739, § 147, it is enacted that every grant of land shall be absolutely void, if at the time of the delivery thereof such land shall be in the actual possession of a person claiming under an adverse title. And whether the defendant had notice of the adverse possession, or not, does not alter the case. (*Jackson v. Durmut*, 9 *John.* 55.)

V. Whatever formal title to the north half of the lot vested in the defendant by the assignment from Whaley, and the subsequent deed from Woodruff, vested in him as the trustee of Miss Clark and her assigns. It is clear that if the legal title had vested in Whaley he would have been the trustee of Miss C., and we insist that the defendant occupies the same position, and took and holds the title to the north half upon the same trusts, and subject to all the equitable rights of Miss C. and her assigns. It would be a waste of time to repeat the several circumstances

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which have been already mentioned in showing that the defendant is not a purchaser in good faith and for a valuable consideration. The same circumstances make him a trustee for Miss C. and her assigns, and it is only necessary for us to refer to a few authorities upon the several points. She had purchased the lot and paid the full consideration, and therefore comes within the principle of *Parks v. Jackson*, (11 *Wend.* 447.) Miss C. was in possession; wherefore the defendant took the conveyance subject to all her equities. (*Gouverneur v. Lynch*, 2 *Paige*, 300. *Spafford v. Manning*, 6 *Id.* 383. *Grimstone v. Carter*, 3 *Id.* 421. *Jackson v. Peck*, 15 *Wend.* 300.) Her deed had been recorded; which was notice to the world, and rendered any subsequent purchaser, who should by chance or fraud acquire the legal title, her trustee. (*Jackson v. Post*, 15 *Wend.* 494.) The defendant certainly had actual constructive notice of Miss Clark's rights, and of the trust upon which Whaley held the lot. If a purchaser have notice of a trust, at the time of his purchase, he becomes a trustee, notwithstanding the consideration was paid. (*Murray v. Ballou*, 1 *John. Ch. R.* 566. *Shepherd v. McEwans*, 4 *Id.* 136.) And any thing which is sufficient to put the defendant on inquiry is equivalent to actual notice. (*Pitney v. Leonard*, 1 *Paige*, 461. *Tuttle v. Jackson*, 6 *Wend.* 613. *Pendleton v. Fay*, 2 *Paige*, 202.) Actual notice need not be shown; and in some cases the court will infer notice. (*Anderson v. Van Alen*, 12 *John.* 343.) There is enough in the case to constitute the defendant the trustee of Miss Clark, aside from the peculiar wording of the assignment and the considerations which have been already alluded to, in another view of the case. Again; Whaley, by his acts, had estopped himself from denying Miss Clark's rights. Woodruff, while he was the owner of the state certificate, admitted her rights, and his knowledge of them; and the defendant is concluded from denying the trusts as well by the acts and declarations of Whaley as of Woodruff, within the principle of *Gresl. Eq. Ev.* 355; *Varick v. Briggs*, (6 *Paige*, 323; 22 *Wend.* 543, *S. C.*;) *Park v. Peck*, (1 *Paige*, 477;) *Cowen & Hill's Notes*, 481.

VI. Under any view which can be taken of the case, it ap-

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pears to us that the maxim "*Qui prior est tempore potior est jure*" will apply, and decide the case in favor of the complainant. The most that the defendant can claim is that his equities are as strong as those of Miss Clark or of the complainant claiming under her; that he has parted with his money without actual knowledge of Miss C.'s claim, and supposed he was getting a title to the premises. To this we answer, Miss Clark first parted with her money, took a conveyance which she supposed would secure her rights, had that conveyance recorded according to law, as notice to the world, and went into the possession of the lot. And when equities are equal, those which are prior in point of time will prevail. (*Grimstone v. Carter*, 3 *Paige*, 421.)

VII. The defendant having no legal or equitable claim to the premises, he by refusing to convey to the complainant rendered himself liable to the costs of the suit; and the decree rightfully charged him with the costs. Costs will be decreed against a trustee unreasonably refusing a conveyance. (*Livingston v. Byrne*, 11 *John*. 555.)

THE CHANCELLOR. The first question for consideration in this cause is what equitable interest C. Woodruff had in the lot, No. 213, and what were his legal rights in the same, after he obtained the patent from the state, and until his conveyance to the defendant, without consideration, on the 5th. of September, 1834. Previous to the contract with Davis, for the southwest quarter of the lot, and the conveyance to Miss Clark of the north half thereof, Whaley was the equitable owner of the whole lot, subject to the payment of the \$30, due to the state, for the unpaid purchase money. By the conveyance of the north half of the lot to Miss Clark with warranty, in 1829, the unpaid purchase money due to the state became primarily chargeable upon the south half of the lot; and the contract with Davis entitled him to the southwest quarter, subject to the payment of the purchase money due upon that contract. And as between Davis and Whaley, as well as between the latter and Miss Clark, the \$30, then due to the state, was chargeable on such purchase

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money. The covenant from the Woodruffs to Whaley is in writing and explains itself. Parol evidence, therefore, cannot be permitted to alter its construction or legal effect. And upon the true and obvious construction of that covenant, or agreement, it is perfectly immaterial whether the Woodruffs were or were not apprized of the conveyance of Whaley, to Miss Clark, at the time of the assignment of the state certificate to them. For they took no beneficial interest whatever in the north half of the lot, nor in the southeast quarter thereof, under that assignment. The equitable rights of the respondent, both as to them, and as to the appellant as the grantee of C. Woodruff, without consideration, would therefore have been the same, even if the deed to Miss Clark had been dated the day after the execution of the covenant to Whaley; the time when it was actually recorded, in the clerk's office, as a conveyance of an interest in real estate.

The assignment of the state certificate, and of Davis' contract to purchase and pay for the south west quarter of the lot, and the covenant of the Woodruffs to quit-claim the other three quarters of the lot to Whaley, were executed at the same time; and were therefore parts of one and the same contract between those parties. The legal effect of that contract was that, upon the obtaining of the patent from the state, the Woodruffs were bound to convey three fourths of the lot to Whaley by a quit-claim deed, absolutely and unconditionally. And as to the southwest quarter they were to convey it to Davis upon his complying with the terms of his contract; and were to receive and retain the purchase money due upon that contract, to reimburse them for the \$30 which they were to pay to the state. But if he did not comply with his contract, they would be entitled to that quarter of the lot, for their own use and benefit, as an equivalent for the moneys paid by them to the state, to obtain the patent. Had the Woodruffs, therefore, obtained the patent previous to the assignment of Whaley's interest in their covenant, and afterwards quitclaimed the residue of the lot to Whaley, according to the terms of that covenant, the previous conveyance of the north half of the lot to Miss Clark with warranty, would have vested the legal title to that half of the lot in her, by estoppel; without

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the necessity of the interposition of this court. The only right, title, or claim therefore, which Whaley had in the lot, under the covenant of the Woodruffs, at the time of the date of the assignment of all his right and title to the respondent, was the right to an absolute conveyance, for his own benefit, of the southeast quarter of the lot, as soon as a patent for the whole lot should be obtained from the state. This then was all that was sold or professed to be sold, to the appellant, by the terms of the assignment to him, in June, 1830, which was endorsed upon the covenant. The appellant therefore took the assignment of Whaley's right to a quitclaim deed under that covenant, subject to the previous right of Miss Clark to the north half of the lot, under the warranty deed from Whaley to her.

Considering the interest of Whaley as a mere equity, at the time of the execution of the deed to Miss Clark, in April, 1829, and at the time of the assignment to the appellant, in June 1830, the prior equity must prevail. For as between equal equities, he who is first in time is strongest in right. And if the recording acts apply to this case, the recording of the deed to Miss Clark, in August, 1829, was constructive notice to the subsequent purchaser of the interest of Whaley, in the same lot under the covenant of the Woodruffs, that she was entitled, by virtue of the covenant of warranty, to any interest which the grantor had in the north half of the lot, either at law or in equity, at the date of the deed to her, or which he might thereafter have acquired under that covenant of the Woodruffs. For if the appellant had examined the records, for the purpose of ascertaining whether Whaley was the equitable owner of the three fourths of the lot which the Woodruffs covenanted to convey to him, by their agreement of the 14th of August, 1829, he would have found the warranty deed of Whaley, which was recorded the next day after that agreement. And that deed showed that Whaley had not acquired, and could not acquire any beneficial interest in the north half of the lot from any person, other than Miss Clark, which would not immediately enure to her benefit by virtue of his covenant of warranty. At the time of the execution of the deed of the fifth of September, 1834, therefore, C

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Woodruff held the legal title to the north half of the lot in trust for the use and benefit of the wife of Shuart; as the actual and absolute owner thereof under the deed from Whaley to her, and under the subsequent covenant to give a quitclaim deed of the three fourths of the lot to Whaley. He also held the legal title of the southwest quarter of the lot for his own use and benefit, subject to the contract of Davis. And the remaining quarter of the lot he held in trust for the appellant.

It appears, by the testimony of Shuart, that after the assignment of the state certificate, and before C. Woodruff obtained the patent from the state, he was distinctly notified by the witness that Mrs. Shuart had a deed from Whaley for the north half of the lot, which was prior in point of time, to the assignment of the state certificate by the latter. The subsequent conveyance of that half of the lot to the appellant was therefore inequitable and unconscientious, on the part of Woodruff, and in fraud of her rights. And that conveyance being entirely without consideration, the appellant is not entitled to hold the land as against the complainant, who has derived title to the same under the conveyance from her and her husband; whether the appellant was or was not apprized of the existence of the deed from her. Nor can the appellant be permitted to set up the insufficiency of the consideration for which she and her husband sold and conveyed their interests in the premises, and when no complaint is made by them on that subject.

In this view of the case, it is unnecessary to inquire whether the appellant had actual notice of the deed to Miss Clark for the north half of the lot; or whether she was in possession at the time of the assignment of Whaley's interest in the covenant of the Woodruffs, in June, 1830, so as to amount to constructive notice of her interest in the premises, independent of the recording of her deed. The complainant therefore was entitled to a decree for the conveyance of the north half of the lot to him. And as the appellant had refused to execute a conveyance of the title, which he had acquired under the deed of September, 1834, after he had notice of the rights of Mrs. Shuart, and of her

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grantee, under the deed of April, 1829, I think he was properly charged with the costs of this suit, which that refusal had rendered necessary.

The decree appealed from must be affirmed with costs.

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In the matter of the petition of VAN WYCK.

[Reviewed, 4 Redf. 203.]

Independent of the statutory provisions on the subject, the court of chancery has no power, upon a mere petition, to discharge a trustee, or to accept his resignation and to appoint another in his place, without the consent of all persons who are, or who upon any future contingency may be, interested in the execution of the trust. The usual course of proceeding for the purpose of changing a trustee, is by bill; to which all persons interested should be made parties, either actually or constructively.

The revised statutes have authorized the court of chancery, upon petition, to accept the resignation of a trustee and to discharge him from his trust, in certain cases. But it *seems* this statutory power does not extend to the case of an executor, so far as relates to his power to sue for and collect debts due to the testator; or as relates to his liability to creditors, legatees, and next of kin, on account of the personal estate which may have come to his hands.

Where a testator, by his will, created a trust as to certain distributive shares of a mixed fund, consisting of the personal estate and the proceeds of the real estate, which shares he directed his executors to invest, as trustees for certain persons, for their respective lives, and then to pay over the principal to their appointees by will, or in default of such appointment, to those who might be their heirs or next of kin at the termination of their respective life estates: *Held*, that where the duties which belonged to the executors, in their character of executors merely, had been fully discharged, and the division of the estate made, the court of chancery had the power to accept the resignation of one of such executors and to appoint another in his place, as one of the trustees to hold the funds set apart for the legatees of the testator.

*Held also*, that the court of chancery had no power to appoint an executor; and that the new or substituted trustee, in such a case, and the remaining trustees of the fund, would not thereafter hold such fund in the character of executors, but as trustees merely; and that they could not be called to account, before the surrogate, in relation to the execution of such trust.

And it *seems* if the court of chancery discharges one of several executors without appointing a new trustee in his place, the remaining executors would not be authorized to execute a power in trust to sell the testator's real estate; so as to give a good title to purchasers.

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By the revised statutes, where a power in trust is vested in several persons, all must unite in its execution. But if, previous to such execution, one or more of such persons dies, the power may be executed by the survivor or survivors.

And where the legal estate is vested in the trustees, with a direction to sell for the benefit of the trust estate, the same result is produced, by the section of the revised statutes which declares that every estate vested in executors or trustees, as such, shall be held by them in joint tenancy.

In the one case, the statute gives to the survivor the whole power in trust to sell, so as to enable him to transfer a good title to the purchaser, by the execution of the power alone. In the other, the whole legal estate is vested in the survivor; and he is thereby enabled to convey the title of the estate to the purchaser, upon a sale thereof in the discharge of his trust.

None of the provisions of the statute authorize a part of the executors, to whom a joint power is given by the testator, to execute the same, so as to transfer a good title to the purchaser, where one of those to whom such joint power was given has been discharged from his trust by the court of chancery, after he accepted the trust, and had duly qualified as executor.

The revised statutes authorize the court of chancery, in the case of a trust relating to real estate, to accept the resignation of a trustee, and to discharge him from the trust, upon his own petition; and they authorize the court to remove him from his trust, for a sufficient cause. And the statute gives the same authority to the court in relation to the acceptance of the resignation of the trustee of a power in trust, and as to his removal from the trusteeship. But the statute does not, in either case, give to the remaining trustees authority to execute the trust alone; as they would have the right to do if the trustee so discharged, or removed, had died, or had never accepted the trust.

And if the person creating the trust has not authorized the trust, or the power in trust to be executed by a part of the trustees, the court of chancery must appoint a new trustee in the place of the one who has resigned or been removed, to join with the others in the execution of such trust, or power in trust; in order to give a valid title to a purchaser.

By the common law, an order or decree of the court of chancery did not have the effect to transfer the legal title to land or real estate. But the court exercised its jurisdiction, in the case of trusts, by compelling the holder of the legal estate, or of a power in trust by which such legal estate could be conveyed, to convey the legal title pursuant to the directions of the decree. And such is still the effect of the orders and decrees of the court, except so far as the provisions of the revised statutes have given to them the effect of a legal transfer, or the effect of authorizing a transfer in a mode not sanctioned by the common law.

THIS was an application by one of the three executors named in the will and codicils of J. Van Wyck, deceased, to be discharged from his trust, and to leave the trust to be executed by the remaining executors. The testator gave certain portions of his real estate to some of his children, at specified prices, as a



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part of their shares of his estate. And he directed his executors to sell the residue of his real and personal property, at the expiration of two years, or as soon thereafter as could conveniently be done, and to convert the same into money, and securities for money, for the benefit of his legatees. Some of the legacies were payable absolutely, to the legatees or their guardians. Others were to be held in trust for legatees for life; so that such legatees might receive the interest or income thereof, for their separate use for life, with power to dispose of the capital of the legacy by will; and in default of such disposition, the same was to go to the next of kin, or heirs of the legatees, according to the statute of distributions of this state. All the cestuis que trust, or persons interested in the estate as legatees, who are in esse and adults at the time of presenting the petition, assented to the prayer thereof. But some of the legatees were infants; and the interests of others who might eventually be entitled to share in the fund, could not be ascertained during the lives of those who were only to have life estates in their respective legacies.

*U. Cole*, for the petitioner.

THE CHANCELLOR. I infer from the petition in this case, that the executors have not had a final settlement of their accounts, before the surrogate, as to the personal estate of the decedent. And it distinctly appears that they have not, to any considerable extent, executed the power in trust contained in the will, to sell the real estate or to convert it into money, or securities for money, for the purposes of distribution. It is therefore very doubtful whether the duties which belong to the executors, in their common law character of executors, and those which devolve upon them strictly as trustees, or as powers in trust, can be separated by this court so as to enable this court to make any order, upon this petition, which will either discharge the future liability of the petitioner; or authorize the other executors to proceed and execute their duties without his concurrence.

Independent of any statutory provisions on the subject, this court has no power, upon a mere petition, to discharge a trust.

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tee, or to accept his resignation and to appoint another in his place, without the consent of all persons who now are, or who upon any future contingency may be interested in the execution of the trust. The usual course of proceeding for the purpose of changing a trustee, is by bill, to which bill all persons interested are either actually or constructively made parties. The revised statutes have authorized this court, upon petition, to accept the resignation of a trustee and to discharge him from his trust in certain cases. (1 *R. S.* 730, § 69.) But it is at least doubtful whether this statutory power extends to the case of an executor, so far as relates to his power to sue for and collect debts due to the testator; or as relates to his liability to creditors, legatees, and next of kin, on account of the personal estate which may have come to his hands. Here there is an actual trust as to certain shares of the mixed fund, consisting of the personal estate and the proceeds of the real estate; which by the will and codicils are to be invested by the executors as trustees for certain persons for life, and then to pay over the principal to their appointees by will, or in default of such appointment, to those who may be their heirs or next of kin, at the termination of their life estates. And if the duties which belong strictly to the petitioner and his associates in their character of executors had been fully discharged, and the division of the estate made, I think this court would be authorized, under this provision of the revised statutes, to accept the resignation of the petitioner, and to appoint another in his place, as one of the trustees, to hold the funds which the testator has set apart as trust funds for the respective legatees. This court, however, has no power to appoint an executor. The new, or substituted trustee in that case, therefore, in conjunction with the remaining trustees of the fund, would no longer hold it in the character of executors, but as trustees merely; and they could not be called to account before the surrogate in relation to the execution of the trust.

Again; the discharge of the petitioner, without appointing a new trustee in his place, would render it doubtful whether the remaining executors could execute the power in trust to sell the testator's real estate, so as to give a good title to purchasers. By

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the revised statutes, where a power in trust is vested in several persons, all must unite in its execution ; but if previous to such execution one or more of such persons should die, the power may be executed by the survivor, or survivors. (1 R. S. 735, § 112.) The same result is produced, where the legal estate is vested in the trustees, with a direction to sell for the benefit of the trust estate, by that section of the revised statutes which declares that every estate vested in executors or trustees as such, shall be held by them in joint tenancy. (*Idem*, 627, § 44.) In the one case, the statute gives to the survivor the whole power in trust to sell, so as to enable him to transfer a good title to the purchaser by the execution of the power alone ; and in the other, the whole legal estate is vested in the survivor, and he is thereby enabled to convey such estate upon a sale thereof in the discharge of the trust. Another section of the revised statutes provides for the case of a power to sell, given jointly to two or more executors, and where one of them refuses to accept the trust, or to take out letters testamentary upon the estate of the decedent. There the statute declares that a sale by such of the executors as shall take upon themselves the execution of the will, shall be equally valid as if the other executors had joined in such sale. (2 R. S. 109, § 55.) None of these provisions, however, extend to the case under consideration ; or authorize a part of the executors to whom a joint power is given, to execute the same so as to transfer a good title to the purchaser, where one of those to whom such joint power was given by the testator has been discharged from his trust by this court, after he had accepted the trust and has duly qualified as executor.

The article of the revised statutes relative to uses and trusts, it is true, expressly authorizes this court, in the case of a trust relating to real estate, to accept the resignation of a trustee, and discharge him from the trust upon his own petition ; and also to remove him from his trust for a sufficient cause, upon the petition of any person interested in the execution of the trust, as well as upon a bill filed for that purpose. (1 R. S. 730, § 69, 70.) And the 120th section of the article relative to powers, (*Idem*, 735,) gives the same authority to the court in relation to

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the acceptance of the resignation of the trustee of a power in trust, and as to his removal from the trusteeship. In neither case, however, does the statute give to the remaining trustees authority to execute the trust alone, in the same manner as if the trustee so discharged or removed was dead, or had never accepted the trust. If the person creating the trust, therefore, has not authorized the execution of the trust, or of the power in trust, by a part of the trustees only, I apprehend, the court must exercise the power given by the first clause of the seventy-first section of the article relative to uses and trusts ; (*Idem*, 731 ;) and must appoint a new trustee in the place of the one who has resigned or been removed, to join with the others in the execution of such trust, or power in trust, in order to give a valid title to a purchaser. By the common law, an order or decree of the court of chancery did not have the effect to transfer the legal title to land or real estate. But the court exercised its jurisdiction, in the case of trusts, by compelling the holder of the legal estate, or of a power in trust by which such legal estate could be conveyed, to convey the legal title pursuant to the directions of the decree. Such must continue to be the effect of its orders and decrees, except so far as the provisions of the revised statutes have given to them the effect of a legal transfer, or the effect of authorizing a transfer in a mode not sanctioned by the common law.

The discharge of the petitioner in the present case, therefore, cannot be granted consistently with the rights of those who are contingently interested in the trust. The petition must be denied.

**COREY vs. CORNELIUS and others.**

The effect of the 39th section of the act of 1831, to abolish imprisonment for debt and to punish fraudulent debtors, was to repeal so much of the provisions of the title of the revised statutes, relative to courts held by justices of the peace, as authorized the execution, issued in a suit commenced by attachment, where the defendant was not personally served with process and did not appear therein, to be levied upon the goods and chattels of the defendant generally. That section also repealed, by implication, so much of the provisions of that title, of the revised statutes, as made the filing of the transcript of such a judgment, in the county clerk's office, a lien upon the real estate of the defendant, and as authorized the county clerk to issue an execution, against such real estate, founded upon the filing of such transcript.

Judgments rendered by justices of the peace upon attachments which were not served on the defendant personally, and to which he did not appear, are not such judgments as will entitle the owner thereof to come into the court of chancery for relief; upon the return of the executions issued thereon, unsatisfied.

The remedy of the owner of such judgments is to bring new suits thereon; so as to give the defendant an opportunity to rebut the prima facie evidence of indebtedness, or to offset any demand which he may have. And if the plaintiff succeeds in obtaining new and general judgments, in those suits, he must proceed and exhaust his remedy against the real as well as personal estate of the defendant, by execution, before he can file a creditor's bill in the court of chancery.

By the first and second sections of the title of the revised statutes relative to executions, and the duties of officers thereon, in connection with the other provisions of those statutes relative to the docketing of judgments and decrees, the right to sell real estate, and chattels real, on executions upon judgments of courts of common law and upon executions founded upon decrees of the court of chancery, is placed upon the same footing. And if the judgment or decree has been docketed, so as to make it a lien upon lands of the debtor in the county to which the execution is issued, it will authorize the sale of the interest which he had in the land at the time of such docketing; if the time prescribed by law for the continuance of such lien has not expired.

But if the judgment or decree has not been docketed, the execution issued thereon will only authorize the sale of such interest as the debtor has in the land at the time of the seizure and sale; subject to the rights of those who have acquired interests in, or liens upon, such lands as purchasers, or incumbrancers, subsequent to the judgment or decree.

Although the 25th section of the act of May, 1840, relative to costs and fees in courts of law, &c., provides that no judgment or decree thereafter to be entered shall be a lien upon real estate, unless the same shall be docketed by the clerk of the county where the lands are situated, yet there is nothing in that act requiring a judgment of the supreme court, or a decree of the court of chancery, to be docketed with the clerk of the county where the real estate of the defendant is situated, to authorize the issuing of an execution against such real estate, to the sheriff of that county.

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But as the process of courts of common pleas, and of the superior court of the city of New-York, does not, in ordinary cases, extend to other counties, it is necessary to have the judgment docketed in the manner prescribed in the 29th section of the act of May, 1840, to authorize such local courts to issue their executions to any other county than that in which such courts are held.

The act of May, 1840, does not, in terms, dispense with the docketing of judgments in the supreme court; in the manner prescribed by the revised statutes. Nor does it authorize the docketing of such judgments in the office of the county clerk, for the purpose of giving them a preference in payment out of the estate of the judgment debtor in case of his death. And it seems, it is necessary the clerks of the supreme court should continue to docket judgments in the manner prescribed in the revised statutes, to entitle such judgments to a preference over subsequent judgment creditors, in payment out of an insolvent estate.

THIS was an appeal from a decision of the vice chancellor of the fourth circuit, refusing to dissolve the usual injunction upon a creditor's bill, against P. Cornelius the judgment debtor. The bill was founded upon a judgment in the supreme court recovered in July term, 1842, for about \$200; and upon three judgments obtained in justices' courts upon proceedings on attachments, on which last mentioned judgments there remained due something more than \$200, after applying thereon the proceeds of the sale of the property of Cornelius, which had been attached. The bill alleged that the judgment in the supreme court, which was originally in favor of R. Zule, had been assigned to the complainant, and that the same had not been paid; but that the whole amount thereof, with interest, was actually and equitably due to him over and above all just claims of the defendant by way of set-off or otherwise. The bill also stated that the record of the judgment in the supreme court was filed in the office of the clerk of that court in Albany, on the 21st of September, 1842, and was docketed in his office on the same day. But the judgment did not appear to have been docketed in the clerk's office of any of the counties in this state, so as to make it a lien upon real estate of the defendant under the provisions of the act of the 14th May, 1840. In November, 1842 an execution was issued upon that judgment to the county of Montgomery, which, as the bill alleged, was the last known place of residence of Cornelius in this state. That execution directed the sheriff to levy the amount of the judgment of the

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goods and chattels of the defendant, and if sufficient could not be found, that he should then cause the damages and costs to be made of the real estate in the county of Montgomery, of which the defendant was seized on the 21st of September, 1842, or at any time afterwards, in whose hands soever the same might be. The sheriff subsequently returned the execution wholly unsatisfied.

The defendant, in his answer, denied the justice of the judgment recovered against him by Zule, in the supreme court, and alleged that he had no recollection and did not believe that any declaration or process was ever served upon him in that suit; and that the judgment was obtained therein without his knowledge, while he was absent in Europe. He also set up several claims by way of offset against the complainants, and therefore denied that any thing was actually and equitably due upon such judgment. He likewise stated, upon information and belief, that the several judgments upon the attachments were irregular and void, and that nothing was due to the plaintiff in one of those judgments at the time of the recovery thereof. The answer further stated that the defendant Cornelius, on the 21st of September, 1842, and ever since, was and still continued to be the owner of lands and real estate in fee simple, in the county of Montgomery, out of which the amount of the judgment in the supreme court could have been collected, if a transcript of such judgment had been filed in the office of the clerk of that county, so as to make the judgment a lien on the said lands and real estate.

*A. C. Paige*, for the appellant. I. The whole equity of the complainant's bill is denied by the answer. The defendant (P. Cornelius) denies that any thing is due on the judgment recovered by Robert Zule. This denial is responsive to the bill. The defendant denies notice of the commencement of the suit by Zule, and denies that he authorized any one to appear for him in such suit. The judgment recovered therein is consequently void. Under such circumstances, the court having no jurisdiction of the person of the defendant, the judgment rendered is void. (*Borden v. Fitch*, 15 John. 121. 13 *Id.* 192

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6 *Wend.* 447.) The allegation in the record, that the defendant appeared by attorney, can be disproved by the defendant. Complainant, by transferring the \$80 note given by P. Cornelius on settlement, to the Baldwins, deprived himself of all right to claim any thing on the judgment. The purchase of the judgment of Zule from French, being for the purpose of bringing a suit thereon, was in violation of article three, title two, chapter three, of the third part of the revised statutes. The complainant has not exhausted his remedy at law on the judgment recovered by Zule. His bill does not allege that the judgment was docketed in the clerk's office of the county of Montgomery, (the last known place of residence of the defendant,) so as to be a lien on his real estate in that county, and to authorize the sale of such real estate under the same. Judgments in courts of record shall bind, and be a charge on lands of persons against whom a judgment shall be rendered, which such persons had at the time of docketing such judgment. (2 *R. S.* 359, § 3.) And such real estate shall be subject to be sold on execution to be issued on such judgment. No judgment shall affect any lands, &c. until the record be filed and docketed. (2 *R. S.* 360, § 12. *See Laws of 1840, p. 334, 335.*) The remedy at law is not exhausted until an execution has been taken out against the whole property of the defendant, both real and personal. Thus a creditor's bill cannot be filed on the return of an execution upon a justice's judgment unsatisfied, which has not been docketed in the clerk's office. (*Dix v. Briggs*, 9 *Paige*, 595.) A creditor's bill must show, affirmatively, that the complainant has exhausted his remedy at law by issuing an execution to the sheriff of the county where the defendant resided when the execution was issued; or the complainant must show a sufficient and legal excuse for not issuing his execution to such county. (*Merchants' and Mechanics' Bank v. Griffith*, 10 *Paige*, 519.) The case of *Youngs v. Morrison*, (*Idem*, 325,) which holds that it is not necessary to state in the bill the docketing of the judgment, &c., conflicts with other cases; and the circumstances of that case are not like this. Executions must be issued to the county where the



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defendant resided when execution was issued. (*Reed v. Wheaton*, 7 *Paige*, 663.) The complainant must first exhaust his remedy at law. (2 *R. S.* 173, 4.) Here the remedy was not exhausted; as the defendant had real estate in Montgomery county. No judgment can affect lands unless it is docketed, and thereby becomes a lien on the lands. And no real estate can be sold under a judgment, unless such judgment is a lien thereon. This is the doctrine of the revised statutes. The act of 1840, *p.* 334, provides that no judgment shall be a lien on real estate, unless the same is docketed in the clerk's office of the county where the lands are situated. This act substitutes the docket in the clerk's office of the county, in place of the docket in the supreme court. No docket is necessary in the supreme court, since the act of 1840. That act requires the judgment to be perfected in the supreme court only—and to be docketed in the county. At common law, lands were not liable to be sold on execution. (*Bingham on Judgments and Executions*, 102, 108. *Gilbert on Executions*, 9.) The revised statutes expressly provide that no judgment shall affect lands unless it be docketed. Unless a judgment is a lien, the owner of the judgment cannot redeem lands sold under a prior judgment. (2 *R. S.* 371.) The execution to be issued on a judgment, only authorizes the sheriff to sell the lands which the defendant had at the time of docketing the judgment. (2 *R. S.* 367, § 26.) Unless, therefore, the judgment has been docketed in the county clerk's office, so as to make it a lien, no lands can be sold under it. The cases under the revised laws, (1 *R. L. of* 1813, *p.* 500,) which decide that a judgment properly docketed after ten years, ranks as a judgment junior to later judgments, and that the lien continues as against the defendant, do not apply; as by the terms of the act, the lien only expired as to bona fide purchasers and junior judgments, and not as to the defendant. And a docket was not made necessary to affect lands, so far as the defendant was concerned. In this case no lien ever existed; there having been no docket in the county. By the revised statutes, (2 *R. S.* 360, § 12,) a judgment, unless docketed, does not affect lands, as to any one.

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II. The creditor's bill is not properly founded on the judgments recovered on the attachments. An attachment is a proceeding in rem against the property attached. It does not reach all the defendant's property. And the execution issued only runs against the property attached. (*Thomas v. The Merchants' Bank*, 9 Paige, 216.) It is like an execution on a justice's judgment not docketed in the clerk's office. (*Dix v. Briggs*, 9 Paige, 595.)

III. It does not appear by the complainant's bill that the justice's court had jurisdiction to render the judgments on the attachments. This is necessary. (*Dix v. Briggs*, 9 Paige, 597. *Laws of 1831*, p. 404, 5.)

IV. Two of the judgments recovered on the attachments were purchased by the complainant, with intent to commence a suit thereon.

V. The defendant denies that any thing is due on the judgment recovered by the complainant on attachment.

VI. If the defendant is not entitled to a dissolution of the injunction on the bill and answer, he asks for a dissolution upon giving security for the payment of the sum equitably due on the judgment recovered by Zule, in the event of the complainant's succeeding to establish that any thing is due, or recoverable thereon.

*D. P. Corey*, for respondent. An injunction upon a creditor's bill will not be dissolved unless the facts charged in the bill, and the whole equity of the bill, be denied positively and fully. A denial upon information and belief is not sufficient. (*Hopk. R.* 148. 1 Paige, 100. 5 *Id.* 112. 1 *Barb. Prac.* 640. 2 *John. Ch.* 204. 9 Paige, 502.) And even when the equity of the bill is denied, it is not a matter of course to dissolve the injunction, but it rests in the discretion of the court, to be governed by the nature of the case. (2 *John. Ch.* 204. 10 Paige, 502.) Any evasion in the answer in not responding to the charges in the bill, or improbable or contradictory statements in the answer, will induce the court to retain the injunction. (1 *Barb. Ch. Pr.* 640.) This answer is of that character. The answer of the

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defendant Cornelius neither denies the facts charged, nor the equity of the bill, but sets up technicalities and evasions. A creditor's bill may be filed upon one or more justice's judgments that amount in the aggregate to \$100 or over, after exhausting the remedy at law. (1 *Barb. Ch. Pr.* 148, 154, 159.) The bill shows the remedy at law exhausted upon all the judgments, by the return of executions unsatisfied; and the answer does not discover or point out any real estate liable to the execution on the judgment in the supreme court, but evades the discovery. Nor does the defendant answer fully as to his personal property. It was not necessary to file a transcript of the justice's judgments; as no lien could have been created thereby. Neither could any other property than that attached be sold under such executions; any more than choses in action could be sold under ordinary executions. (2 *R. S.* 203, § 298.) Still the court will assist such executions, (1 *Barb. Pr.* 152, 158,) without docketing the judgment. (See 10 *Paige*, 325.) This court is not authorized to inquire into the regularity of a judgment upon which a bill is founded. (1 *Barb. Ch. Pr.* 159, (s), &c.)

THE CHANCELLOR. Upon a careful examination of the answer in this case, I am satisfied the appellant did not intend to state positively that he was never served with process, or with a copy of the declaration in the suit in the supreme court. It is not necessary, therefore, to consider the question whether it is competent for the defendant, upon a creditor's bill filed in this court, to question the validity of the judgment, or the right of the attorney to appear for him in the court at law. Upon principle, however, I think the remedy of the defendant, if any, is by an application to the supreme court to set aside the judgment; or by an action against the attorney who has appeared for the defendant in that suit without authority, if such appearance would have the effect to make the proceedings in that suit regular without the service of process. If the judgment is to be considered as valid in this court, I do not understand the answer to contain a denial that the whole amount for which it was given is still due and unpaid. And the defendant is not in a situation

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avail himself of the alleged offset, against the complainant, upon this motion to dissolve the injunction. The defendant himself cannot know whether the complainant was guilty of any breach of professional duty in not applying the \$100 in settling the claim of Zule. The fact that Zule claimed and actually recovered a sum much beyond the \$100, in that suit, exclusive of the costs, is sufficient to raise a presumption that he would not have accepted the sum which the defendant says was left with the attorney to pay the claim. And the fact that the attorney afterwards claimed to be the owner of and actually sold the note which the defendant says he gave to Zule upon the settlement with him, is no evidence that the attorney came into the possession of that note wrongfully, and without a full consideration paid to the holder thereof. It becomes necessary, therefore, to inquire whether the complainant was in a situation to file a creditor's bill upon either of the judgments mentioned in the pleadings and proofs in this cause.

The 39th section of the act of 1831, to abolish imprisonment for debt and to punish fraudulent debtors, (*Laws of 1831, p. 405*), declares that a judgment, before a justice, in a suit commenced by attachment, where the defendant is not personally served with process and does not appear, shall be only presumptive evidence of indebtedness, in any suit that may be brought thereon; and may be repelled by the defendant. The same section also declares that the execution issued upon such judgment shall not be levied upon any other property than such as was seized under the attachment; nor shall the defendant be barred of any set-off he may have against the plaintiff. The revised statutes only authorized the goods and chattels of the defendant to be seized under an attachment issued by a justice; but did not authorize such attachment to be served upon real estate of the defendant. (2 *R. S.* 230, § 30.) The effect of the 39th section of the act of April, 1831, therefore, is to repeal so much of the provisions of the title of the revised statutes, relative to courts held by justices of the peace, as authorized the execution, issued in a suit commenced by attachment, where the defendant was not personally served with process and did not appear

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therein, to be levied upon the goods and chattels of the defendant generally. And it also repeals, by necessary implication, so much of the provisions of that title of the revised statutes as made the filing of the transcript of such a judgment, in the county clerk's office, a lien upon the real estate of the defendant; and authorized the county clerk to issue an execution against such real estate, founded upon the filing of that transcript. The several judgments, stated in the complainant's bill, founded upon attachments which were never served on the defendant personally, and to which he did not appear, are not such judgments as would entitle the owners thereof to come into this court for relief, upon the return of the executions unsatisfied, even if the transcripts thereof had been filed in the office of the clerk of the county within which such judgments were recovered. The remedy of the complainant, as the owner of those judgments, is to bring new suits thereon; so as to give the defendant an opportunity to rebut the prima facie evidence of indebtedness, or to offset any demand he may have which is a proper subject of offset. And if the complainant succeeds in obtaining new and general judgments, in those suits, he must proceed and exhaust his remedy against the real as well as the personal estate of the defendant, by executions on such new judgments, before he will be entitled to come into this court for relief, and to obtain satisfaction out of property which he is unable to reach by such executions.

It remains for me to examine the question, whether an execution could be issued upon the judgment in the supreme court, under the provisions of the revised statutes and of the act of May, 1840, which could authorize the sale of the real estate of the defendant; such judgment never having been docketed, in the county where the execution was issued, so as to make the judgment a lien upon the defendant's real estate in that county.

When the case of *Youngs v. Morrison*, (10 *Paige's Rep.* 325,) was before me, upon an appeal from the decision of one of the vice chancellors overruling a demurrer to the complainant's bill, I was not aware that the provisions of the revised statutes as to the rights of judgment creditors to sell the real estate of the debtors, against whom judgments had been recovered in courts

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of record, were materially varied from the language of the statute on that subject as it previously existed. I have, therefore, supposed that the effect of the 25th section of the act of May, 1840, requiring judgments and decrees to be docketed with the clerk of the county in order to make them liens upon the real estate of the debtor in such county, left the right of the plaintiff unimpaired to sell the real estate of the defendant upon execution, except as against bona fide purchasers or incumbrancers. The argument in the present case, however, has led me to reconsider the question, and I will now state the result of my re-examination of the subject.

It is well known to every lawyer, that the real estate of a judgment debtor could not, by the common law, be taken in execution. The only remedy of the creditor was by a writ of *fiere facias* against the goods and chattels of the defendant in the judgment, or, by a *levari facias*, to levy the debt by the sale of his goods and the seizure of the accruing profits of his lands. But in 1285, the statute of Westminster, 2d Ch. 18, was passed, giving to the creditor a writ of *elegit* upon his judgment; by which writ the sheriff was directed to deliver the goods of the defendant, at an appraisal, in payment of the judgment; and if that was not sufficient, he was also to deliver to the creditor a moiety of the freehold lands. Under this statute, the courts held the judgment to be a lien upon the land of the defendant from the first day of the term of the court in which such judgment was obtained. This relation back, of the judgment, to the first day of the term, was found to be unjust as against bona fide purchasers of the land before the judgment was actually entered. And in 1677, the act for the prevention of frauds and perjuries, (29 Ch. 2, c. 3,) required the judge who signed the record of the judgment, to specify the time of signing the same in the margin of the record. That act also provided that such judgment, as against bona fide purchasers of the land of the judgment debtor, should not relate to the first day of the term, but should only be considered as a judgment from the time of signing thereof. Fifteen years afterwards, the statute 4th and 5th William & Mary, c. 20, required judgments to be docketed; and declared

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that judgments not docketed should not affect lands or tenements as against purchasers or mortgagees, or have any preference against heirs, executors or administrators, in the administration of their ancestor's, testator's or intestate's estates. When the act of the 5th George 2d, c. 7, subjected all lands in the colonies to sale upon execution against the owners of such lands, upon judgments obtained in the colonial courts of record, the same principle of constructive lien from the time of the signing of the judgment, was applied to all the freehold lands of the defendant within the reach of the process of the court, by the judges in this and other colonies. That act was repealed in this state in the revision of 1787, which, in terms, repealed all English statutes that had previously been in force here. But its provisions were retained in the revised act of the 19th of March, 1787. (1 *Greenl. Laws*, 407.) The first section of that act declared that the lands and tenements, and real estate of every debtor, should be liable to be sold upon execution on judgments recovered in courts of record. The second section required the time of signing of the record to be specified, and directed the clerk of the court to mark the time of filing the record upon the same. It further declared that no judgment should affect any lands or tenements, as to purchasers or mortgagees, or have any preference in the administration of the estates of deceased persons, but from the time of the actual filing of the record of such judgment. And the third section contained a re-enactment, in substance, of the provisions of the 4th and 5th William & Mary, c. 20, relative to the docketing of judgments, and the consequences of an omission to docket the same. The seventh section prescribed the form of the execution; which was, that if sufficient goods and chattels of the judgment debtor could not be found to satisfy the debt and costs, that the sheriff should cause such debt and costs to be made of the lands and tenements whereof the judgment debtor was seized on the day *when such lands became liable to the debt*, (specifying the time,) or at any time afterwards, in whose hands soever the same might be. The same provisions were contained in the revision, of 1801, of the act concerning judgments and executions. (1 *R. L. of 1801*

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p. 388.) The revised act of 1813 contained the same provisions, except, that in the first section of that act it is, in terms, declared that the judgment shall be a lien upon the lands, tenements and real estate of the judgment debtor. The uniform practice under these several acts, has been, so far as my knowledge extends, to direct the sheriff to cause the debt and costs to be made of the lands and tenements whereof the judgment debtor was seised upon the day of the filing of the judgment record, specifying that time in the execution, whether the judgment had or had not been docketed at the time of issuing such execution. And it will be seen by a reference to these several statutes, that the clerk was not required to docket the judgment immediately upon filing the record, though he was bound to docket the same during the term in which it was entered, or within six days thereafter. And by those statutes, the right to sell the land upon execution, as against the debtor himself, did not depend upon the question whether the judgment had or had not been docketed. But the real estate became liable to be sold upon the execution to be issued on such judgment, the moment the judgment record was filed in the office of the clerk of the court, after it had been signed by the proper officer; though as against subsequent purchasers and mortgagees, the title acquired by the sheriff's sale did not relate back to the filing of the judgment record, unless the judgment had been properly docketed within the time allowed by law for that purpose. It may also be proper to remark, that in 1802, the legislature, for the first time, authorized the court of chancery to enforce its decrees by execution against the goods and chattels, lands and tenements of the person against whom such decree was made. No provision, however, was made for the docketing of such decrees. But the fourth section of the revised act of 1813, concerning the court of chancery, contained a provision that the goods or chattels, lands or tenements, should not be bound, as against a bona fide purchaser, until an actual levy or seizure by virtue of the execution. And the form of the execution, as settled by this court, pursuant to the provisions of that act, directed the sheriff to levy the amount of the decree of the lands and tenements of



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the debtor generally, in case the personal property was insufficient for that purpose, without any reference to the date of the decree; leaving the question of priority as between the purchaser under such execution and decree, and other creditors of the defendant by judgment or decree, to be settled by the general principles of law in such cases.

It is insisted by the counsel for the appellant, in the present case, that the revised statutes have entirely changed the previous law on the subject of sales of real estate, and of chattels real, so that no sale thereof can now be made by virtue of an execution issued upon a judgment of a court of common law, until such judgment has been actually docketed; so as to make it a lien upon such real estate or chattels real, as against subsequent purchasers or incumbrancers. And I admit that the third section of the title of the revised statutes relative to judgments, (2 R. S. 359,) when taken in connection with the twenty-fourth section of the title relative to executions, and the duties of officers thereon, (*Idem*, 367,) which prescribes the form of the execution to be issued out of the courts of common law, appears to indicate an intention to change the former law upon the subject, so as to make the docketing of the judgment an absolute prerequisite to the exercise of the power to sell the defendant's real estate upon execution. As no power existed at the common law to sell freehold estate upon execution, such would be the necessary effect of these provisions as to the defendant's freehold lands, upon the repeal of all the former statutes authorizing such sales, if the revised statutes had not, by other sections, authorized the issuing of an execution against the lands and tenements and chattels real of the judgment debtor generally; and without any other qualification of the right, than that the record of the judgment shall be filed before the issuing of such execution. Such a right, however, is given by the first and second sections of the title relative to executions and the duties of officers thereon. (2 R. S. 363.) And I think the effect of these sections, in connection with the other provisions of the revised statutes relative to the docketing of judgments and decrees, was to put the right to sell real estate and chattels real, on executions

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upon judgments of courts of common law, and on executions founded upon decrees of this court, on the same footing. That is, if the judgment or decree has been docketed, so as to make it a lien upon lands of the debtor, in the county to which the execution is issued, it will authorize the sale of the interest which he had in the land at the time of such docketing; if the time prescribed by law for the continuance of such lien has not expired. But if it has not been docketed, it will only authorize the sale of such interest as the debtor has in the land at the time of the seizure and sale; subject to the rights of those who have acquired interests in, or liens upon, such lands, as purchasers or incumbrancers subsequent to the judgment or decree. The twenty-fifth section of the act of May, 1840, (*Laws of 1840, p. 334.*) provides that no judgment or decree, thereafter to be entered, shall be a lien upon real estate, unless the same shall be docketed, in books to be provided and kept for that purpose, by the clerk of the county where the lands are situated. But there is nothing in that act requiring a judgment of the supreme court, or a decree of the court of chancery, to be docketed with the clerk of the county where the real estate of the defendant is situated; to authorize the issuing of an execution, against such real estate to the sheriff of that county. But as the process of courts of common pleas, and of the superior court of the city of New-York, does not in ordinary cases extend to other counties, it is necessary to have the judgment docketed in the manner prescribed in the 29th section of the act of 1840, to authorize such local courts to issue their executions to any other county than that in which such local courts are held. It may also be proper to state that the act of May, 1840, does not in terms dispense with the docketing of judgments in the supreme court, in the manner prescribed by the revised statutes. Nor does it authorize the docketing of such judgments in the office of the county clerk, for the purpose of giving them a preference in payment out of the estate of the judgment debtor, in case of his death. And it may, therefore be necessary that the clerks of the supreme court should continue to docket judgments in the manner prescribed in the revised

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statutes, to entitle them to a preference over subsequent judgment creditors, in payment out of an insolvent estate. (*See 2 R. S. 87, § 27. Idem, 360, § 12.*)

In this case the bill alleges that the judgment in the supreme court was docketed in the office of the clerk of that court, at Albany, on the 21st of September, 1842. That was sufficient, therefore, to authorize the execution to be issued in the form it was; although the neglect to docket it also in the county of Montgomery, prevented its operating as a lien on the real estate of the defendant in that county. The issuing of the execution to the county in which the defendant last resided, and the return of that execution unsatisfied, is sufficient to sustain the injunction, and to authorize a decree in this suit for the amount of the judgment in the supreme court, with interest and costs. The order appealed from is therefore not erroneous; and it must be affirmed with costs. Under the circumstances of this case, however, it must be affirmed without prejudice to the right of the defendant to apply to the vice chancellor to dissolve the injunction upon paying into court the amount of the judgment of the supreme court, with interest thereon, and giving security for such costs as may be recovered against him in this suit; with liberty to the complainant to take such money out of court upon the usual security to refund, if he does not eventually succeed in obtaining a decree for the amount thereof.

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Upon an application for leave to examine a co-defendant as a witness, there must be an affidavit that the person proposed to be examined is not interested in the matters to which he is to be examined. An affidavit of the solicitor that he is advised and believes such person is a competent witness, is not sufficient.

Where an original bill has been filed against all the necessary parties, the transfer of the interest of one or more of the defendants to a third person, who represents the same right and interest—as by a bankrupt assignment pending the litigation—

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renders it necessary to file a supplemental bill against the grantee or assignee of the original defendant, to bring him before the court as a party. But in such cases the only matter proper to be put in issue upon the supplemental bill—unless some matter of defence has arisen since the joining of the issue in the original cause—is the supplemental matter which is stated in such new bill to show the transmission of interest from the original party, to the new party who is brought before the court by the supplemental bill.

The effect of such a bill is to revive the proceedings against the new defendant who has succeeded to the rights of the original party, and to place the proceedings in the same situation as they were in against the former party when the original suit became defective. If the original bill has been fully answered, the new defendant adopts that as his answer to the original bill. If the bill had been taken as confessed, the order pro confesso stands against him, unless he obtains leave of the court to have it opened. And if the proofs in the cause had been closed, they remain closed as against him.

A supplemental bill of this character is a mere continuation of the original suit, against the new defendant who has succeeded to the interest of the former party. And the supplemental suit, together with the original bill and the proceedings under it, constitute but one record. And if the supplemental bill is filed before a decree, the original and supplemental suits are heard together, and but one decree will be made in both.

THIS was an application on the part of the defendant, Gary V. Sackett, for an order to examine the defendants, S. S. & W. M. Bayard, as witnesses in behalf of Sackett, and for a commission, and to extend the time to take testimony until the return of such commission.

The original bill was filed against the Bayards to foreclose and obtain satisfaction of a bond and mortgage, given by them to S. Bayard, deceased, and assigned by him to the complainants; and the executor of a subsequent mortgagee was made a party to the suit. The Bayards put in an answer setting up the defence of usury to the bond and mortgage. The cause was in readiness for hearing, and a rule to produce witnesses was entered and served in the spring of 1842; and an order to close the proofs was regularly entered. In February, 1844, the Bayards having been decreed to be bankrupts, the supplemental bill in this cause was filed against them, and the defendant Sackett as their assignee in bankruptcy, to revive and continue the suit; and other persons who had acquired some of the interest of the complainants in the bond and mortgage, were also made defen-

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dants in such supplemental bill. The cause was in readiness to take testimony upon the supplemental bill, as between the complainants and the defendant Sackett, in the fore part of December, 1845, none of the other defendants having put in an answer entitling them to take testimony. And in January, 1846, the complainants entered and served the usual order to produce witnesses in forty days, which time the defendant, Sackett, subsequently got extended, by an *ex parte* order, for sixty days. The object of this application was to examine the Bayards as witnesses for their assignee in bankruptcy, to establish the usury set up in their answer to the original bill, and which their assignee had again set up in his answer to the supplemental bill.

*S. D. Van Schaack*, for the defendant Sackett.

*J. Rhoades*, for the complainants.

THE CHANCELLOR. Several of the objections to this application are well taken. *First*, there is no affidavit that the Bayards are not interested in the matters as to which they are to be examined. The petition of their assignee only states that one of them is a material witness, not that he is not interested in the matters to which he is to be examined. And the affidavit of the solicitor, that they have been discharged under the bankrupt act, and that he is advised and believes they are competent witnesses, is not sufficient. To render them competent, they should at least have released to their assignee all right to the surplus of their estate, if there should be more than sufficient to pay their debts, in case they succeed in defeating the recovery upon this bond and mortgage.

A more substantial objection to this application, however, is, that it appears from the papers before me, that the defence of usury was set up by the answer of the Bayards to the original bill, and that the proofs in relation to that issue were regularly closed a long time previous to the filing of the supplemental bill. And as the assignee in bankruptcy, who is brought before the court by the supplemental bill, stands in the place of the Bay-

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ards, and represents the same right and interest which was in litigation in the original suit, he is in the same situation as an heir at law or a devisee would have been if the suit had abated by the death of the original defendants. Where an original bill has been filed against all the necessary parties, the transfer of the interest of one or more of the defendants to a third person who represents the same right and interest, as by a sale or bankruptcy pending the litigation, may render it necessary to file a supplemental bill against the grantee or assignee of the original defendant or defendants to bring him before the court as a party. But in such cases the only matter proper to be put in issue upon the supplemental bill, unless some new matter of defence has arisen since the joining of the issue in the original cause, is the supplemental matter, which is stated in the new bill, to show the transmission of interest from the original party to the new party who is brought before the court by the supplemental bill. The effect of such a bill is to revive the proceedings against the new defendant, who has succeeded to the rights of the original party, and to place them in the same situation as they were in against the latter, when the original suit became defective. If the original bill had been fully answered, the new defendant adopts that as his answer to the original bill; if the bill had been taken as confessed, the order pro confesso stands as against him, unless he obtains leave of the court to have it opened; and if the proofs in the cause had been closed, they remain closed as against him. In *Bagnal v. Bagnal*, (12 Vin. Abr. 114,) decided in 1725, where a supplemental bill was brought after publication in the original cause, it was held to be irregular to examine witnesses to a matter that was in issue and not proved in the original cause. A supplemental bill of this character is a mere continuation of the original suit, against the new defendant who has succeeded to the interest of the former party; and the supplemental suit, together with the original bill and the proceedings under it, constitute but one record. And if the supplemental bill is filed before a decree, the original and supplemental suits are heard together, and but one decree will be made in both.

The application in this case is denied, with ten dollars costs.

**CUNNING and others vs. STEBBINS.**

Where, subsequent to the commencement of a creditor's suit against the defendant, the complainants' solicitor discovered that a creditor's bill had previously been filed by them upon one of the judgments set forth in said bill, and that the suit thus commenced was still pending; and the complainants amended the bill in the last suit, by leaving out all the statement therein relative to that judgment, and the issuing and return of the execution unsatisfied, leaving the amended bill to stand as an ordinary creditor's bill, founded upon the other judgment only, with the original jurat attached thereto; but the amendments were properly sworn to, for the purpose of verifying the bill as amended; *Held*, that the amendment was one which could be made of course, to a creditor's bill, under the provisions of the 190th rule. And that to authorize such an amendment of a creditor's bill, no rule or order for leave to amend is necessary; although an injunction has been issued.

*Held also*, that it was not necessary to issue a new execution, and to have it returned unsatisfied, before commencing the suit.

A creditor's bill may be filed at any time within ten years after the complainant has exhausted his remedy against the defendant's property, by the return of an execution unsatisfied, which has been issued to the proper county.

There is no limitation, in the statute, of the right of a judgment creditor to apply to the court of chancery for relief in such cases; except the ten years which the statute has fixed as the time within which suits purely of equitable cognizance must be brought in the court of chancery.

The case of *Storms v. Ruggles*, (1 *Clarke's Ch. Rep.* 148,) overruled.

After the expiration of ten years from the time of the return of an execution unsatisfied, the complainant must issue a new execution to the county where the defendant then resides, before he can file a creditor's bill, where his right, founded upon the return of the first execution, is barred by lapse of time, and the judgment still remains in force.

THIS was an application on the part of the defendant to set aside an order for the appointment of a receiver, upon a creditor's bill, and to dissolve the injunction and take the amended bill of complaint off the files of the court, for irregularity.

The original bill was in the usual form of creditor's bills, and was founded upon two judgments in the supreme court, against the defendant and in favor of the complainants, which were recovered in 1839. Executions thereon were issued, in that year, to the sheriff of the county where the judgment debtor then resided; and were subsequently returned unsatisfied. The defendant entered his appearance in person, not being a so-

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licitor of the court. The motion to vacate the order for the appointment of a receiver was founded upon an alleged want of notice of the application for such order. But the affidavit of the complainant's solicitor showed that due notice of the application was given. After the copy of the original bill had been served upon the defendant, the solicitor for the complainants discovered that a creditor's bill had previously been filed by them upon one of the judgments, and that the suit thus commenced was still pending. He therefore amended the bill in the present suit, by leaving out all the statements therein relative to that judgment and the issuing and return of the execution unsatisfied, leaving the amended bill to stand as an ordinary creditor's bill, founded upon the other judgment only, with the original jurat attached thereto. But the amendments were properly sworn to, for the purpose of verifying the bill as amended, and were duly filed with the register where the original bill was filed. The defendant also insisted that he had a good defence, inasmuch as the original execution had been returned unsatisfied more than six years before the commencement of this suit.

*J. Rhoades*, for the complainants.

*A. Bockes*, for defendant.

THE CHANCELLOR. The order for the appointment of a receiver appears to have been regularly obtained, upon a personal service of notice of the application. And the amendment of the bill appears to have been perfectly regular. The original bill was true at the time it was sworn to, and it still remained true after every thing originally contained therein relative to the first judgment, and the proceedings thereon, had been stricken out by the amendment. The amendment therefore was one which could be made of course, to a creditor's bill, under the provisions of the 190th rule of the court. And to authorize such an amendment of a creditor's bill, under the present rules of the court, no rule or order for leave to amend was necessary; although an injunction had been issued. Nor was it necessary to issue a



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new execution, and have it returned unsatisfied, before commencing this suit; especially as it is not alleged by the defendant, that he has property liable to execution in the county where he now resides, out of which the amount of the judgment could have been collected by the sheriff. In the case of *Storms v. Ruggles*, (1 *Clark's Ch. Rep.* 148,) the vice chancellor of the 8th circuit decided that a creditor's bill could not be filed, after five years, without issuing a new execution upon the judgment to the county where the defendant resides. But that case was not well considered, and has frequently been overruled by this court. After the complainant has once exhausted his remedy at law, by the return unsatisfied of an execution which has been issued to the proper county, the statute gives him the right to come here for the purpose of reaching the equitable interests and things in action of the defendant. And I know of no limitation of that right, short of the ten years which the statute has fixed as the time within which suits purely of equitable cognizance must be brought in this court. The remedy of the defendant, to prevent unnecessary costs, if he has the means of paying the judgment, is to apply his property for that purpose. And if he has not sufficient property, the complainant should not be subjected to the useless delay and expense of issuing a second execution, and having it returned unsatisfied, before he files his bill.

Where the complainant wantonly files a bill here for the mere purpose of making unnecessary costs, notwithstanding the defendant has an abundance of property to satisfy the debt, and which the complainant knows may be reached and applied to that purpose by the mere issuing of a second execution, the court may, in the exercise of a sound discretion, refuse to give him costs. But I am aware of no principle which will authorize the court to withhold the remedy given to him by the statute because the defendant has neglected to pay his debt for any period short of that fixed by the statute of limitations. After the expiration of ten years, the complainant would probably be compelled to issue a new execution to the county where the defendant resides, so as to give him a new right to the interposition

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of a court of equity for relief, before he could file a creditor's bill; where his right, founded upon the return of the first execution, was barred by lapse of time, and the judgment still remained in full force and effect.

There is no ground whatever for setting aside the order to appoint a receiver, or for dissolving the injunction, or for granting any other part of this application. It must therefore be denied with costs. But the appointment of a receiver will not prevent the defendant from putting in an answer and setting up a defence, if he has any, to the whole or any part of the claim of the complainants, for the satisfaction of which this suit was commenced.

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 WILSON vs. WILSON and others.

[Criticiised, 12 How. 107; 9 N. Y. 142.]

A suit properly commenced in the court of chancery is neither barred nor abated by the appointment of a receiver of one of the defendants *pendente lite*. At most, such an appointment will only render the suit defective; so as to make it irregular for the complainant to proceed until the receiver is brought before the court, by a supplemental bill in the nature of a bill of revivor.

Even if such subsequent appointment of a receiver constituted a valid defence, it could not be pleaded as a bar to the suit generally; but should be pleaded in bar of the further continuance of the suit merely, in analogy to the form of pleading in similar cases in suits at law.

Where, by the appointment of a receiver of one of the defendants *pendente lite*, a suit in the court of chancery has become so defective that it is improper for the complainant to proceed until the receiver is brought before the court, the proper course for the other defendant is to apply for an order that the complainant bring the receiver before the court, by a supplemental bill in the nature of a bill of revivor, within a time to be fixed, or that the bill be dismissed; and that in the meantime all proceedings be stayed.

It seems the act of April, 1845, in relation to the powers of receivers, and of committees of lunatics and habitual drunkards, does not have the effect to transfer the title of real estate to a receiver, by the mere order of the court, and without an actual conveyance from the party to the suit in whom such legal title is vested.

THIS was an appeal, by the complainant, from a decision of the vice chancellor of the first circuit, refusing to overrule a plea

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in a foreclosure suit as frivolous, and denying the usual decree as upon a bill taken as confessed for want of an answer.

The complainant was the assignee of a bond and mortgage given by the defendant D. Wilson, who was still the owner of the equity of redemption; and the defendant Nowal was made a defendant as a subsequent incumbrancer having a judgment which was a lien upon the mortgaged premises. Previous to the commencement of this suit, the defendant Nowal had filed a creditor's bill upon his judgment against D. Wilson, the mortgagor, in which suit, subsequent to the filing of the bill of foreclosure in the present cause, Nowal obtained the usual order for the appointment of a receiver. Under that order a receiver was afterwards appointed; and the defendant D. Wilson thereupon assigned all his property, including his equity of redemption in the mortgaged premises, to such receiver, under the order of the court. The defendant Nowal pleaded these facts in bar of the suit generally; insisting that the receiver was a necessary party.

*A. Thompson*, for the appellant.

*B. W. Bonney*, for the respondent.

THE CHANCELLOR. The plea is so manifestly bad as not to admit of an argument, and must therefore be considered as frivolous. There is no pretence that there was any defect of parties at the time of the commencement of this suit. For no order for the appointment of a receiver had then been made; and the complainant in the creditor's suit was made a defendant in this bill of foreclosure. Even if the subsequent appointment of a receiver had constituted a valid defence, it could not have been pleaded as a bar to the suit generally, but should have been pleaded in bar of the *further continuance of the suit* merely; in analogy to the form of pleading in similar cases in suits at law. (*Le Bret v. Papillon*, 4 *East's Rep.* 502. 1 *Chitty on Pl. 7th Lond. ed.* 578, 688.) The matter pleaded in this case, however, is no bar, even to the further continuance of the suit; as the suit, which was properly commenced, is neither

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barred nor abated by the appointment of a receiver of one of the defendants *pendente lite*. At most, it can only render the suit defective, so as to make it irregular for the complainant to proceed until the receiver is brought before the court, by a supplemental bill in the nature of a bill of revivor. The facts pleaded, therefore, did not constitute the proper subject of a plea of any kind. If the suit had become so defective that it was improper for the complainant to proceed until the receiver appointed *pendente lite* was brought before the court, the proper course for the defendant Nowal would have been to move the court for an order, on due notice of the application, that the complainant bring the receiver before the court, by a supplemental bill in the nature of a bill of revivor, within such time as might be prescribed by the vice chancellor for that purpose, or that the complainant's bill be dismissed; and that in the meantime all proceedings upon the original bill be stayed.

I am inclined to the opinion, however, that in this case the parties in interest are sufficiently represented to render it unnecessary to file a supplemental bill, to bring the receiver before the court, in order to make the decree binding upon him as the assignee of the equity of redemption *pendente lite*. At law, an ordinary receiver was not considered as having the legal title, so as to authorize him to institute a suit in his own name for any debt or demand transferred to him, or to the possession or control of which he was entitled under an order of this court until the act of April, 1845, in relation to the powers of receivers and of committees of lunatics and habitual drunkards. (*Laws of 1845, p. 90.*) And even that act does not appear to be broad enough to transfer the title of real estate to the receiver, by the mere order of the court, and without an actual conveyance from the party to the suit in whom such legal title is vested. So far as the title to the equity of redemption is concerned, the receiver, to whom D. Wilson has transferred that title, under the order of the court in the creditor's suit, pending this suit of foreclosure, may properly be considered as a purchaser or grantee of D. Wilson *pendente lite*; so that the purchaser, at the master's sale of the mortgaged premises, will get a good title at law under

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the decree. And as the real parties in interest, for whose benefit that receiver was appointed—the complainant and the defendant in the creditor's suit—are both before the court upon this bill of foreclosure, and are perfectly competent to protect their rights in relation to the equity of redemption, this court would not permit its officer to disturb the title of the purchaser under the decree of foreclosure, by a bill to redeem for their benefit. For this reason it would be a useless expense to compel the complainant to bring the receiver before the court by a supplemental bill in the present case.

The counsel for the respondent states, however, that he believes his client has a good defence to the suit upon the merits, which he wishes to avail himself of by an answer to the bill. The proper time to state the existence of such a defence is when the motion to overrule the plea as frivolous is made; and by an affidavit of the defendant showing the fact of such defence, and the nature thereof. But as this was a question of practice which was not fully settled, I shall allow the respondent to put in an answer to the bill, on the usual terms; provided such answer is put in upon oath.

The order appealed from must be reversed, with costs; and the plea of the defendant Nowal must be overruled as frivolous, with costs of the motion. And the defendant must pay these costs and put in his answer, upon oath, within thirty days after service of the taxed bill of costs, or the bill may be taken as confessed upon filing an affidavit showing the default; unless the vice chancellor, upon application to him, shall think proper to allow the defendant Nowal further time to put in his answer.

## GOODHUE and others vs. CHURCHMAN and others.

A final decree, which has been regularly entered, upon a bill taken as confessed, will not be set aside upon the mere affidavit of the defendant that he is advised he has a good defence on the merits. He must either state the nature and facts of his defence in the affidavit, or he must move upon the sworn answer which he proposes to put in; so that the court can see what that defence is. And in either case, the complainant is entitled to service of a copy of the answer or affidavit upon which the motion is based.

Where the whole defence in a suit rests upon the information and belief of a part of the defendants, as to matters which they have derived from some of their co-defendants, to justify the opening of a regular decree, upon an answer setting up those matters, such answer should be served upon the complainant's solicitor, together with an affidavit of the person who furnished the information which constitutes the alleged defence.

The objection that a decree is erroneous, and is not warranted by the allegations in the bill upon which it is founded, affords no sufficient ground for vacating such decree upon motion.

If a decree is erroneous, in that respect, the remedy of the party injured is by an application for a rehearing; or if the decree has been enrolled, by a bill of review.

THIS was an appeal from an order of the vice chancellor of the first circuit, denying the application of three of the defendants to vacate the decree entered in this cause, and to allow those defendants to put in an answer to the bill of the complainants. The answer proposed to be put in was not served upon the complainant's solicitor with notice of the application, and therefore could not be read upon the motion. But the counsel for the appellants insisted that the decree was erroneous upon the bill taken as confessed, and was not warranted by the case made by the bill.

*J. R. Whiting*, for the appellants.

*J. Coit*, for the respondents.

THE CHANCELLOR. It has repeatedly been decided, in this court, that a final decree which has been regularly entered, upon a bill taken as confessed, will not be set aside upon the mere affidavit of the defendant that he is advised he has a good

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Goodhue v. Churchman.

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defence on the merits. He must either state the nature and facts of his defence in the affidavit on which his application is founded, or he must move upon the sworn answer which he proposes to put in; so that the court can see what that defence is. And in either case, the complainant is entitled to a service of a copy of the answer, or affidavit, upon which the motion is based. The answer in this case—which had not been served upon the solicitor the usual time before the application was made—could not properly be read in support of the motion. I have looked into the answer, however, for the purpose of seeing if any thing was sworn to by either of the defendants, as facts within their own knowledge, constituting a meritorious defence. And I find that the whole defence rests upon the information and belief of these defendants, as to matters which they have derived from some of their co-defendants, who appear to have obtained the acceptance, upon which this suit is based, from the appellants improperly. To justify the opening of a regular decree upon that answer, therefore, they should not only have served it upon the complainants' solicitor, as a part of the foundation of their application, but they should have annexed the affidavit of the person who gave them the information which constitutes the alleged defence. Without such an affidavit, the complainants should not be compelled to give up their decree and go into a protracted litigation with parties who are admitted to be insolvent; especially as the complainants offer to open the default, provided security is given for the payment of the debt and costs which they may eventually recover against the appellants in this suit.

The objection that the decree is erroneous, and is not warranted by the allegations in the bill upon which it is founded, affords no sufficient ground for vacating the decree upon motion. If it was erroneous in that respect, the remedy of the appellants was by an application for a rehearing, and in the form prescribed by the rules of this court. Or, if the decree had been enrolled, the remedy was by a bill of review. There was, perhaps, a technical error in taking the decree for the balance due on account of the advance made upon this acceptance, without proof that the value of the property mentioned in that acceptance, and

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In the matter of Cregier.

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which was not subsequently delivered, was equal to that balance ; there being no averment in the bill to that effect. But as the form in which the proposed decree was intended to be taken was stated to one of the appellants and he made no objection on that ground, it may fairly be inferred that the property mentioned in the acceptance was equal to the advance made to the drawers on the faith of that acceptance. If so, the decree which has been taken is more favorable to the appellants than they would have been strictly entitled to, upon their bill taken as confessed.

The order appealed from must therefore be confirmed with costs.

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In the matter of CREGIER and others, infants.

Where a son takes land by descent from his father, subject to the dower of his mother in the same, and her dower is afterwards assigned to her, such assignment relates back to the death of the father ; so as to deprive the widow of the son, who died in the lifetime of his mother, of dower even in the reversion of the third of the estate which is assigned to the mother for dower.

Upon the same principle, where an estate descends to a daughter of the owner, who is a feme covert, and who dies in the lifetime of the mother to whom dower in the premises is subsequently assigned, the husband of such daughter will not be entitled to an estate by the curtesy in the third of the premises which is thus assigned to the widow of his wife's father for dower ; even after the termination of the life estate of such widow in that third of the premises.

Where an estate comes to the husband or wife by purchase, subject to the mere contingent right of dower of the wife of the grantor in case she survives him, the grantee becomes seised of a present estate in the whole premises, subject only to a contingent right of dower in one third thereof. And upon the death of such grantee, during the life of the widow of the grantor, the husband, or wife, of such grantee, is entitled to an estate by the curtesy, or in dower, in the whole premises ; subject only to the incumbrance of the prior right of dower in one third of that estate, during the actual continuance of that right.

But where an estate comes to a person by descent, as heir at law, he takes it subject to the present right of dower of the widow of the decedent ; and the assignment of dower to the widow of the ancestor relates back to the time of the death of such ancestor, so as to prevent the seisin of the heir at law as of a present estate, in the third of the premises assigned to the widow during her life.



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The legal effect of such want of seisin, of a present estate during coverture, will be to deprive the surviving husband, or wife, of the heir, who dies during the continuance of such estate in dower, of any right to have curtesy, or dower, in that part of the premises, even after the death of the widow of the ancestor.

Where the widow of the father has dower assigned to her in the whole of the land, before the widow of the grandfather has been endowed—whether such assignment was voluntary or was obtained by suit against the son and heir—if the widow of the grandfather is subsequently endowed, the widow of the father, after the death of the widow whose claim was paramount, will be entitled to be restored to her dower in the whole premises; in the same manner as if the title of her husband had been conveyed to him by the grandfather in his lifetime, instead of coming to him by descent subject to the immediate right of his mother to a life estate in one third thereof.

In a case where two widows are claiming dower as against the infant heir, in the same part of the estate, simultaneously, the grandmother is to be considered as first endowed of one third of the infant's share, which endowment, by relation, defeats the seisin of the father of the infant, from the time of the descent cast upon him, as to that third; and the mother of the infant is only entitled to one third of the other two thirds, as her dower.

THIS was an application for the sale of the real estate of infants, in which certain adult parties interested in the premises, consented to join in the sale, upon receiving their several proportions of the proceeds thereof, and to pay their respective proportions of the costs of the proceedings. The farm, proposed to be sold, originally belonged to F. Vander Bogert, who died intestate, leaving his widow, Harriet Vander Bogert, surviving him, and five sons and one daughter, his only heirs at law. Isaac, one of the sons, afterwards died in the lifetime of his mother; leaving Augusta Vander Bogert, his widow, and one infant child surviving. The daughter of F. Vander Bogert also died after her father, and in the lifetime of her mother; leaving her husband S. Cregier surviving, and one infant child by him, her only heir at law.

The master to whom it was referred to ascertain the truth of the facts stated in the petition, and the value of the infants' interests in the farm, reported that their grandmother was entitled to dower in their respective sixth parts of the farm. He also reported that S. Cregier was entitled to a life estate, as tenant by the curtesy, in the whole of his daughter's undivided sixth part of the premises, subject to the dower of her grandmother. He

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likewise reported that the widow of Isaac Vander Bogert was entitled to dower in the whole of her daughter's one sixth part of the premises, subject to the dower of the grandmother in the same. And he estimated the value of the life estate of S. Cregier and of the dower of the widow of Isaac Vander Bogert, respectively; by deducting from the one sixth of the value of the farm, the value of the dower of the grandmother of the infants in that sixth, and then computing the value of the estate of S. Cregier as tenant by the curtesy, and of the dower of Augusta Vander Bogert, upon the principle of life annuities; in the same manner as if the shares had been conveyed to Isaac Vander Bogert and his sister in the lifetime of their father. He also computed the value of the estate by the curtesy of S. Cregier as if he had been forty years of age only, although he was nearer the age of forty-one than forty.

*J. Fuller* for the petitioner.

THE CHANCELLOR. The master has mistaken the legal rights of the parties in respect to their several interests in the premises. Where the husband takes land by descent from his father, subject to the dower of his mother in the same, and the dower is afterwards assigned to her, such assignment relates back to the death of the father; so as to deprive the widow of the son, who dies in the lifetime of his mother, of dower even in the reversion of the third of the estate which is assigned to the mother for dower. (*Dunham v. Osborn*, 1 *Paige's Rep.* 634.) And upon the same principle, where the estate descends to a daughter who is a feme covert, and who dies in the lifetime of the mother to whom dower in the premises is subsequently assigned, the husband of such daughter will not be entitled to an estate by the curtesy in the third of the premises which is thus assigned to the widow of his wife's father, for dower; even after the termination of the life estate of such widow in that third of the premises. (*Reynolds v. Reynolds*, 5 *Paige's Rep.* 161.)

I am aware that a contrary decision was made by the supreme

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court of this state in the case of *Bear v. Snyder*, (11 *Wend. Rep.* 592.) It is evident, however, that the learned Chief Justice Savage, who delivered the opinion in that case, had overlooked the distinction which exists between an estate which comes to the husband or wife by purchase, subject to the mere contingent right of dower of the wife of the grantor in case she survives him, and an estate by descent, which the heir at law takes subject to the present right of dower of the widow of the decedent. In the first case, the grantee of the land becomes seised of a present estate in the whole premises, subject only to a contingent right of dower in one third thereof. So that upon the death of such grantee, during the life of the widow of the grantor, the husband, or wife, of such grantee, is entitled to an estate by the curtesy, or in dower, in the whole premises; subject only to the incumbrance of the prior right of dower in one third of that estate during the actual continuance of that right. But, in the other case, the assignment of dower to the widow of the ancestor relates back to the time of his death, so as to prevent the seisin of the heir at law as of a present estate in the third of the premises assigned to the widow during her life. And the legal effect of such want of seisin, of a present estate during coverture, will be to deprive the surviving husband or wife of the heir who dies during the continuance of such estate in dower, of any right to have curtesy or dower in that part of the premises, even after the death of the widow of the ancestor.

The rule on this subject is thus stated in Coventry's readable edition of Coke upon Littleton; "If there be grandfather, father and son, and the grandfather is seised of three acres of land in fee, and takes wife and dies, this land descends to the father, who dies *either before or after entry*, now is the wife of the father dowable. The father dies, and the wife of the grandfather is endowed of one acre and dies, the wife of the father shall be endowed only of the two acres residue. For the dower of the grandmother is paramount to the title of the wife of the father, and the seisin of the father, which descended to him, be it in law or actual, is defeated. And now upon the matter th

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father had but a reversion expectant upon a freehold; and in that case *dos de dote peti non debet*, although the wife of the grandfather dies living the father's wife." (*Cov. Coke*, 31, a.) And this rule is also recognized by Perkins, and by Park and other writers, as the settled law on the subject. (*Perk.* 139, § 315. *Park on Dow.* 154. *Watk. on Desc.* 65.) But where the widow of the father has dower assigned to her in the whole land before the widow of the grandfather has been endowed, whether such assignment was voluntary or was obtained by suit against the son and heir, if the widow of the grandfather is subsequently endowed, the widow of the father, after the death of the widow whose claim was paramount, will be entitled to be restored to her dower in the whole premises; in the same manner as if the title of her husband had been conveyed to him in his lifetime, instead of coming to him by descent subject to the immediate right of his mother to a life estate in one third thereof (*Perk.* 140, § 316. *Coke Litt.* 31, b.)

In the present case, I presume there has been no actual assignment of the dower, either of the grandmother or of the mother of the infant daughter of Isaac Vander Bogert, in the one sixth of the estate which descended to him from his father. It must therefore, be considered as a case in which both widows are claiming dower in that part of the estate simultaneously, as against the infant heir. In such a case, the grandmother must be considered as first endowed of one third of the infant's share; which, by relation, defeats the seisin of the father from the time of the descent cast upon him, as to that third, and the mother of the infant is only entitled to one third of the other two thirds, as her dower. The same principle must also be applied to the seisin of the mother of the other infant, which is defeated as to the one third thereof, by relation, from the death of F. Vander Bogert, the grandfather of the infant; so as to entitle her father to an estate by the curtesy in the other two thirds only. The computation of the value of the dower of Augusta Vander Bogert, in the share of the farm which has descended to her infant daughter, must be ascertained by deducting one third from the value of one sixth of the whole farm, and then computing her

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In the matter of Cregier.

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dower in the remaining two thirds, upon the principles of life, annuities. And the value of the life estate of S. Cregier in two thirds of his daughter's share as tenant by the curtesy, must be ascertained in the same manner.

The master also erred in computing the interest of S. Cregier, upon the probable duration of a life of forty years only, when in fact, he was nearer forty-one years of age than forty. He should, in that case, have taken the estimated value of the life of a person of the age of forty-one, as the basis of computation. The value of the dower of the grandmother, computed upon her age, which will be fifty-seven in about two months, and estimating the whole value of the farm at \$5,000, as stated in the master's report, is \$139,04, in the one sixth of the estate belonging to each of the infants. The value of Augusta Vander Bogert's dower in two thirds of one sixth of the value of the farm, her age being twenty-five years, is \$134,03. And the value of the life estate of S. Cregier as tenant by the curtesy in two thirds of his daughter's one sixth of the farm, calling his age forty-one years, is \$352,97. The master's report must be amended accordingly. And the special guardian is to be authorized to sell the infants' interest in the farm; the several adults having interests therein, joining in such sale, and consenting to bear their respective shares of the costs of this proceeding, in proportion to the value of their several rights and interests in the premises.

Order accordingly.

## FERGUSON vs. FERGUSON.

Where a bill against a husband, for a divorce, contained a general charge that the defendant, between the day of his marriage with the complainant, in March, 1843, and the 30th of September, 1844, had been guilty of adultery with some female in the city of New-York, and an issue was framed in the words of that general allegation, and upon the trial no attempt was made to prove any act of adultery in the city of New-York, or at any other place, except by implication from the stains upon the defendant's linen, supposed to be the stains arising from libidinous intercourse; *Held* that the jury were not authorized in finding a verdict for the complainant upon such evidence.

It is the duty, and is within the power of the court of chancery, to grant a new trial of a feigned issue, on a bill for a divorce, where there is reason to believe the defendant has been unjustly found guilty of adultery.

The object of requiring a jury trial in suits for a divorce, on the ground of adultery, where the adultery is denied, is to protect the rights of the defendant. And the court will not make a decree of divorce where there is reason to doubt the fact of his guilt.

**THIS** was an appeal from an order of the vice chancellor of the first circuit, granting a new trial upon a feigned issue. The complainant filed a bill against her husband, for a divorce, on the ground of his alleged adultery. The bill charged that the defendant had committed adultery with S. M. D., and one issue was framed upon that charge. It also contained a general charge, that the defendant, between the day of his marriage with the complainant, in March, 1843, and the 30th of September, 1844, had been guilty of adultery with some female in the city of New-York: and another issue was framed in the words of that general allegation. On the trial, no attempt was made to prove the specific charge of adultery with S. M. D., or any other act of adultery in the city of New-York, or at any other place, except by implication from the stains upon his linen, supposed to be the stains of disease arising from libidinous intercourse.

*J. R. Whiting & B. D. Silliman*, for the appellant.

*Joseph L. White*, for the respondent.

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THE CHANCELLOR. Upon the evidence in this case, I think the jury were not warranted in finding a verdict for the complainant upon either of the issues. No evidence was given under the first issue, even to create a suspicion that the defendant had been guilty of adultery with the individual named in the complainant's bill. Nor was there a particle of evidence to justify a suspicion of an improper intercourse with any person, except the suspicion arising from the stains upon the defendant's linen. Even if it were conclusively proved that these stains proceeded from the part of the defendant's person which their situation upon his body linen seemed to indicate, it would not be sufficient of itself, uncorroborated by other circumstances, to authorize the jury to presume that they had been produced by an adulterous intercourse. Doctor Male is of the opinion that an honest and virtuous female, affected by the *fluor albus*, or leucorrhœa, may communicate a disease to her husband that will produce a gonorrheal discharge resembling, in appearance, that of syphilitic origin. Indeed, if medical writers are right in supposing that the *gonorrhea impura* itself is produced by the inflammation of the cellular tissue of the mucous membrane of the vagina, or of the urethra, causing a discharge of purulent matter therefrom, it is evident that strictures, and other irritations of the urethra, may produce a purulent discharge resembling the disease which arises from impure and guilty intercourse.

Again; Dunglisson says pus is almost always of the same nature, whatever may be the part it proceeds from. And there can be very little doubt that the stains produced by a purulent discharge from any of the mucous membranes would, when dry, so nearly resemble those of syphilitic origin as to render it impossible to distinguish the one from the other. Doctor Cairnes was then probably right in testifying that the color of the stains, produced by either, would depend entirely upon the violence of the disease; and that no physician could, by the appearance alone, tell the one from the other, when dry. There are various ways, therefore, in which these stains of purulent matter may have been produced, consistently with the entire

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innocence of the defendant; and that, too, without supposing that any person had produced these stains intentionally upon the linen, and placed it in a situation to be seen by the witnesses who were called upon to notice its appearance, and place their marks upon it.

The ready acquiescence of the defendant in the suggestion, of the complainant's solicitor, for an examination of his person, was certainly a circumstance in his favor. Nor is it any thing against him, that when he found that Norris, his personal enemy, had been brought into his house to listen to his conversation, he immediately retracted his consent, and kicked Norris out of doors. On the contrary, it was just what might have been expected from a man of ordinary spirit, under such circumstances, who was conscious of his innocence. The testimony of the medical witnesses who examined the person of the defendant is very strong in his favor, to show the utter improbability that he should have been affected with the disease attributed to him at the time the stains upon his linen are supposed to have been made; although medical writers agree that it is possible to conceal the existence of the disease for a short time by the use of temporary remedies.

I have no doubt of the power and duty of the court, in a case of this kind, to grant a new trial, where there is reason to believe the defendant has been unjustly convicted of an odious offence against the laws of decency and morality; although the court is bound to grant an issue, and cannot make a final decree in the cause except upon the verdict of a jury. The object of requiring a jury trial in all cases of this kind, where the adultery is denied, is for the protection of the rights of the accused. And the court should not make a decree which is to deprive the defendant of some of the most important of his social rights, where there is so much reason to doubt the fact of his guilt.

For these reasons, I think the decision of the vice chancellor, in awarding a new trial, was right. The order appealed from must therefore be affirmed with costs.



## THOMPSON vs. S. &amp; M. MOUNT.

It is a rule of the court of chancery that mere inadequacy of price is not sufficient to entitle a party to an order for the resale of lands under a decree, where the purchase has been made by a stranger to the suit, and where the party applying for a resale was in a situation to understand and protect his rights, but has suffered the property to be sacrificed by his own negligence.

Where the owner of premises covered by a mortgage was a non-resident of the state, and was ignorant of the institution of the suit to foreclose such mortgage, until after the sale of the premises under a decree; and the agent to whom he had confided the care of the property, had, by the visitation of God, been so far deprived of his reason as to be incapable of attending to any business, in consequence of which the premises were sold at a price far below their value; *Held*, that it was a proper case for setting aside the sale, and ordering a resale of the premises.

The court of chancery will open a sale of property made under its decree, where the price bid bears no reasonable proportion to the actual value of the property, and where the loss has been occasioned by an accident which no ordinary vigilance and foresight could have guarded against. But the court will not interfere to protect parties against their own negligence, where property has been fairly sold and struck off to a stranger to the suit.

THIS was an appeal by Joseph Hewlett, the purchaser at the master's sale under a decree of foreclosure in this suit, from an order of the vice chancellor of the first circuit, allowing a resale. The facts in the case were substantially as follows: The defendant, S. Mount, was the owner of a house and lot in the city of New-York, as heir at law of his deceased son, on which the complainant held a mortgage, given by the decedent, for \$1000. S. Mount was an old man of eighty-seven years, residing in the state of New Jersey; and being from his age incompetent to take charge of the house and lot personally, he employed his son-in-law, H. Schenck, to manage the property for him. In August, 1845, the complainant filed her bill in this cause to foreclose the mortgage; and S. Mount, the owner of the premises, was proceeded against as an absentee, and had no knowledge of the proceedings until after the sale of the premises under the decree. Schenck, the agent, was informed of the existence of the suit, and applied to the complainant's solicitor for a little delay, to enable him to procure the money and settle it; and was told by

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him that he could have until the time fixed by the order of the court for the absent defendant to appear in the suit. And about that time Schenck, the agent, who also resided in the state of New Jersey, was taken sick with a brain fever, so as to render him wholly incompetent to transact any business whatever; which sickness continued until after the notice of the application to the vice chancellor for the resale of the mortgaged premises. On the 24th of February, 1846, a decree of foreclosure and sale was obtained; and immediately afterwards the premises were advertised for sale by the master, for the 20th of March. And the premises were sold on the last mentioned day, and were struck off to the appellant for \$2275; which was about half the real value thereof. The appellant paid ten per cent of the purchase money at the time of the sale, and procured the residue thereof so as to be ready to pay the same as soon as the title could be examined and the decree enrolled. But before that was done, the defendant, S. Mount, heard of the commencement of the suit, and of the decree and sale under the same, and immediately applied for a resale; offering to pay all the expenses of the sale, and the expenses of Hewlett, the purchaser for the examination of the title and loss of interest upon the purchase money, &c. The vice chancellor set aside the sale, and directed the ten per cent paid by the purchaser to be refunded to him, together with the amount paid by him to the auctioneer. And he also ordered the respondent, S. Mount, to pay to him the interest upon the whole of the purchase money, and the amount of his disbursements in the examination of the title, together with his costs and expenses in resisting the application for a resale. From this order of the vice chancellor, Hewlett, the purchaser, appealed.

*E. Benedict*, for the appellant.

*H. F. Clark*, for the respondent.

**THE CHANCELLOR.** The rule of this court is, that mere inadequacy of price is not sufficient to entitle a party to an order for

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the resale of lands, under a decree, where the purchase has been made by a stranger to the suit, and where the party applying for a resale was in a situation to understand and protect his rights, but has suffered the property to be sacrificed by his own negligence. But this case does not come within the principle of that rule; for the respondent was wholly ignorant of the institution of the foreclosure suit until after the sale. And the agent, to whom he had confided the care of the property had, by the visitation of God, been so far deprived of his reason as to be rendered incapable of attending to the business of his principal, or even of communicating with him upon the subject. This case, therefore, is like that of *Duncan v. Dodd*, (2 *Paige's Rep.* 99;) except that the equity of the respondent is stronger; inasmuch as the sale of the property at a price so far below its value was occasioned by a visitation of Providence, rather than the negligence of the agent who had been employed to protect the rights of his father-in-law in the property. In a case not reported, this court set aside a sale where the property had been struck off at a price much below its value, owing to the misfortune of the defendant in having his horse drop down dead while he was on his way to attend the sale; in consequence of which, he did not arrive until a short time after the premises had been put up and sold by the master. The court must be permitted to open sales, in cases of that kind, to prevent great injustice, where the price bid bears no reasonable proportion to the actual value of the property, and where the loss has been occasioned by an accident which no ordinary vigilance and foresight could have guarded against. Nor will the opening of a sale under such circumstances be likely to destroy competition at master's sales, so long as the court acts upon the principle of affording full and perfect indemnity to the purchaser for all his costs, expenses and losses in consequence of his purchase. For no reasonable man will desire to make a speculation out of the misfortune of his neighbor, arising from a dispensation of Providence. At the same time, I wish it to be distinctly understood, that the court does not interfere to protect parties against their own negligence,

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where the property has been fairly sold and struck off to a stranger to the suit.

The order appealed from in this case, was not erroneous, and it must be affirmed with costs.

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KENDALL vs. KENDALL.

In a suit for a divorce, on the ground of adultery, if the wife obtains a decree for costs against her husband, she is not entitled to collect the whole amount of her taxable costs, if a sum has already been advanced to her, or to her solicitor, or next friend, on account of such costs, *pendente lite*.

But the allowance to her for costs and expenses of the suit is not confined to the mere taxable costs as between party and party. In litigated cases, where the wife is necessarily subjected to extra expenses and counsel fees, in addition to the taxable costs as between party and party, the whole amount which has been advanced to her, *pendente lite*, for costs and expenses, should not be deducted from the ordinary bill of costs as between party and party, to which she is entitled under the decree. And the husband should be allowed only for the balance of his advances, after deducting therefrom the necessary expenditures of the wife for counsel fees, &c., which are not included in the ordinary taxed bill.

The decree in such cases should direct the taxing officer, upon the taxation of the costs of the wife, under the decree, to allow to the husband the amount of his advances, *pendente lite*, in diminution of the taxable costs; after deducting from such advances the reasonable expenses and counsel fees which have been paid by the wife, and which are not included in the ordinary taxed bill. Or, the court itself should determine whether any, and if any, what allowances should be made for extra expenses and counsel fees, beyond the taxable costs; and should direct that the residue of the advances, which have been made by the husband, be deducted, by the taxing officer, upon the taxation of the costs under the decree.

In ordinary cases, where the husband is the defendant in a suit for a divorce, and admits the allegations in the bill, either by his answer or by allowing the bill to be taken as confessed against him, the ordinary taxable costs are sufficient to cover all the reasonable expenses of the suit, except the extra expense which may be necessary to procure the attendance of witnesses before the master, in addition to the allowance made by law to the witnesses. And that is all that should be allowed in such cases; unless it is made to appear that something special had occurred in the progress of the suit to render the employment of counsel, other than the solicitor in the cause, necessary.

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THIS was an appeal by the complainant from an order of the vice chancellor of the first circuit. The bill was filed by the wife, against her husband, to obtain a divorce on the ground of adultery. The defendant put in an answer admitting the adultery, and the usual reference was made to a master to take the proof of the complainant's allegations, and to report his opinion thereon. And upon the coming in of the report, the usual decree for a divorce was granted, with costs to be paid by the defendant. Pending the suit, an application was made for an allowance for the expenses of the complainant in the prosecution of her suit; and an order for the payment of \$100 for that purpose, was made. The defendant paid that sum to the complainant's solicitors pursuant to the order, previous to the entry of the final decree; but in the taxation of the costs, no credit was given for any part of the sum so advanced. Upon an application to the vice chancellor, before whom the suit was pending, he directed the whole \$100 to be deducted from the complainant's costs as taxed. And from that decision the complainant appealed.

*J. L. White*, for the appellant.

*T. Warner*, for the respondent.

THE CHANCELLOR. The statute authorizes the court, in cases of this kind, to require the husband to pay any sums necessary to carry on the suit during its pendency; and the court may also decree costs against either party, and award execution for the same, &c. (2 R. S. 148, § 57.) But it was not the intention of the legislature that the wife should recover the whole amount of taxable costs at the termination of the suit, where a sum had been advanced to her, or to her solicitor, or next friend, on account of such costs, pendente lite. Nor was it intended that the allowance to her for costs and expenses of the suit should be confined to the mere taxable costs, as between party and party. In litigated cases, where the wife is necessarily subjected to extra expenses and counsel fees, in addition to the taxable costs ~~as~~ between party and party, the whole amount which

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has been advanced to her, pendente lite, for costs and expenses, should not be deducted from the ordinary bill of costs as between party and party to which she is entitled under the decree. But the husband should only be allowed for the balance of his advances, after deducting therefrom the necessary expenditures of the wife, for counsel fees &c., which are not included in the ordinary taxed bill. The decree in such cases should, therefore, direct the taxing officer, upon the taxation of the costs of the wife, under the decree, to allow to the husband the amount of his advances, pendente lite, in diminution of the taxable costs; after deducting from such advances such reasonable expenses and counsel fees as have been paid by the wife, and which are not included in the ordinary taxed bill. Or the court itself should determine whether any, and if any, what allowance should be made for extra expenses and counsel fees beyond the taxable costs; and direct the residue of the advances which have been made by the husband to be deducted, by the taxing officer, upon the taxation of costs under the decree.

In ordinary cases, where the husband is the defendant, and admits the allegations in the complainant's bill, either by answer or by allowing it to be taken as confessed against him, the customary taxable costs are sufficient to cover all the usual expenses of the suit, except the extra expense which may be necessary to procure the attendance of witnesses before the master, in addition to the allowance made by law to them. And that is all that should be allowed in such cases, unless it is shown that something special has occurred in the cause to render the employment of counsel, other than the regular solicitor, necessary.

In the present case, it appears there was a litigation before the master in relation to alimony, which might require the employment of counsel. But if a proper allegation of faculties was filed with the master, and the answer of the husband taken to the same, as should have been done before proceeding with the reference to ascertain the proper amount of alimony, the whole business of the reference ought to have been concluded in less than six days, instead of being protracted for six months. Under the circumstances of this case, I think the allowance of a counsel

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fee of \$25, in addition to the taxable costs, should have been allowed to be retained out of the moneys advanced by the husband pendente lite. But the allowance of the whole \$100 for that purpose would have been unreasonable and oppressive.

The order appealed from must therefore be modified accordingly. And neither party is to have costs as against the other, either on this appeal or upon the original application to the vice chancellor to have the advance of the husband deducted from the taxed bill.

Proceedings remitted.

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ALDRICH vs. REYNOLDS.

[Followed, 9 Mo. App. 3.]

**The purchaser of mortgaged premises, upon a foreclosure and sale thereof, is entitled to the growing crops or emblements thereon, as against the mortgagor. And as they would necessarily enhance the price which the mortgaged premises would bring at such sale, it is proper to allow the value of the crops, &c. taken off by the mortgagor, during the time in which the sale of the premises was suspended by an injunction, as a part of the defendant's damages sustained by reason of an injunction staying the complainant from selling the premises under his decree.**

**The interest upon the whole sum, the collection of which is either suspended or defeated by an injunction, is also a part of the damages sustained by the defendant by reason of such injunction.**

**A party enjoined is also entitled to recover, as damages, the counsel fees which he has been obliged to pay to obtain a dissolution of the injunction; as well as the taxable costs of so much of the proceedings in the suit as were necessary to obtain such dissolution.**

**And the costs of the reference to a master to ascertain the amount of damages, are likewise a part of the damage which the party enjoined has a right to recover, upon the dissolution of the injunction.**

**THIS case came before the chancellor on exceptions to the master's report upon a reference to ascertain the amount of damages sustained by the defendant by reason of an injunction.**

The defendant held a bond and mortgage upon a farm in the possession of the complainant, and advertised the mortgaged premises for sale under a statute foreclosure; which sale was to

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have taken place on the 5th of June, 1845. Previous to that time, the complainant obtained an injunction staying the sale. And to obtain such injunction, he gave a bond with sureties, pursuant to the directions of the 31st rule of the court of chancery, conditioned to pay to the defendant such damages as he might sustain by reason of the injunction, if the court should eventually decide that the complainant was not equitably entitled to such injunction. Upon the reference, it appeared that on the 5th of June, 1845, the crops and grass upon the premises, and which were afterwards taken off by the complainant, during the continuance of the injunction, were worth \$90,30, exclusive of the labor and expense of protecting, gathering and securing the same. The sale was stayed by the injunction until the 28th of August, and did not finally take place until the 13th of Sept. 1845 ; when the premises were sold for \$200 only ; leaving a balance due upon the bond and mortgage given by the complainant, of about \$100, including the costs of the foreclosure and sale.

The master allowed, as a part of the damages, the value of the crops and grass, taken from the premises by the complainant during the time the sale was stayed. He also allowed the interest upon the amount due on the bond and mortgage, from the 5th of June to the 28th of August, and the extra expense of continuing the notice of sale during the time the sale was suspended by the injunction. And he allowed the taxable costs of the defendant in obtaining a dissolution of the injunction and upon the reference ; as well as \$25 which had been paid by the defendant as an extra counsel fee in obtaining a dissolution of the injunction.

The complainant excepted to the allowance of the value of the crops taken off, as damages ; to the allowance of the interest on the whole mortgage debt during the time the sale was suspended by the injunction ; and to the \$25, paid as extra counsel fees. He also excepted to certain items of costs as not taxable.

*N. Hill Jr.*, for complainant.

*A. Taber*, for defendant.



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THE CHANCELLOR. The testimony, as reported by the master, shows that if the purchaser under a statute foreclosure is entitled to the crops which are growing upon the mortgaged premises at the time of the sale, the premises would have sold, on the 5th of June, for \$90,30 more than they brought in September; and would have produced just about the amount of the mortgage with the interest thereon, and the costs of foreclosure. The defendant therefore lost, not only the difference between what the lot would have brought in June, and that for which it was actually sold, after the injunction had enabled the mortgagor to strip it of its crops and grass, but also the interest on the amount which he would have been entitled to receive if the sale had taken place on the 5th of June. It therefore presents the question whether the purchaser upon a foreclosure and sale of mortgaged premises is entitled to the growing crops, or emblements. This question appears to have been very fully considered by the supreme court, in the case of *Lane v. King*, (8 *Wend. Rep.* 584.) And it was there decided that neither the mortgagor nor his lessee subsequent to the giving of the mortgage, was entitled to the crops growing upon the land at the time of the foreclosure and sale; but that they belonged to the purchaser. If so, they would necessarily enhance the price which the mortgaged premises would bring at the sale. This appears to be in accordance with the principle that where the determination of the estate depends upon the voluntary act of the owner thereof, or where the estate is defeasible by a right paramount, or by a forfeiture, or a breach of condition depending on his own act or omission, he who has the paramount right, or who enters for the forfeiture or breach of condition, is entitled to the emblements. (*Coke Lit.* 55, 6.) By the common law, the non-payment of the mortgage money at the time fixed upon by the parties, was in the nature of a forfeiture of the estate by the mortgagor; and authorized the mortgagee to enter immediately, and to take the emblements. But in equity, he held them, as he did the land, only as a security for the payment of the mortgage debt; and upon redemption, he was bound to account for such emblements. Having the legal right, however,

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and the land and its products being a security to the mortgagee for his debt, a court of equity will not deprive him of his legal right to the emblements until the mortgage money and interest are fully paid. The master was therefore right in charging the value of the emblements &c., taken off by the mortgagor during the time the sale was suspended, as a part of the defendant's damages sustained by reason of the injunction.

The interest upon the whole sum, of which the collection was suspended or defeated, was also a part of his damages consequent upon the injunction. For if it had not been granted, the mortgaged premises would probably have been sold in June for enough to pay the whole mortgage debt, with interest and costs. The only error the master has committed in relation to the interest, is that he did not charge enough. The defendant not only lost the interest on his whole debt during the time the sale was suspended by the injunction, but he also loses the interest on the \$90,30 subsequent to the sale. It would therefore have been proper to compute the interest on this last amount down to the date of the report.

In the case of *Edwards v. Bodine*, (*In Chan. Oct. 1, 1844*), this court decided, on a full examination of the question, that a party enjoined was entitled to recover the counsel fees which he had been compelled to pay out to obtain a dissolution of the injunction; as well as the taxable costs of so much of the proceedings in the suit as were necessary to procure such dissolution. That question, therefore, is no longer open to discussion here. And the cost of the reference to ascertain the amount of damages, also appears to be a part of the damage to which the defendant has necessarily been put, by reason of the injunction. The master was therefore right in allowing that also.

Objections were made in these exceptions to several items of the costs allowed by the master, but those cannot properly be considered here. The parties, by consent, submitted the question as to the items of the costs, to the master to be taxed and allowed by him, instead of having them taxed by the proper officer of the court for that purpose; reserving only the right of either party to raise the question whether any of the items so

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taxed and allowed by him were taxable as a part of the damages, or only as costs in the cause. The master's decision was therefore final as to the fact that the services had been performed, and that the folios were correctly charged. And the only question which it is competent to raise on these exceptions, is whether the costs, as taxed by the master, were properly recoverable on the bond taken upon the allowance of the injunction, as a part of the damages sustained by the defendant. A different mode of proceeding is to be adopted where the parties wish to review the decision of a taxing officer.

Admitting the services to have been performed as charged, and that the number of folios is stated correctly, I see nothing in the bill of costs, as allowed and taxed by the master under the stipulation, which was not caused by the injunction, and rendered necessary, to relieve the defendant against the same and the consequences thereof. The whole was therefore very properly allowed as damages sustained by the defendant by reason of the injunction.

The exceptions must all be overruled, with costs; and the report of the master must be confirmed.

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GOODYEAR and others vs. BLOODGOOD, executor, &c. and others.

A bill may be filed by legatees, and those who have succeeded to their rights, without taking out letters of administration *de bonis non*, to recover from the personal representative of the deceased executor of their testator, moneys which were in the hands of such executor, and which he held as trustee for the complainants at the time of his death, and which he ought to have accounted for and paid over to them.

Where the debts and funeral expenses of a decedent have been paid, the legatees alone have an interest in compelling the personal representative of the last surviving executor to account for and pay over the moneys belonging to the estate, and which were received by such executor in his lifetime. And it is not necessary that an administrator with the will annexed, of such decedent, should be made a party to a suit brought for that purpose

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THIS was an appeal from a decretal order of the vice chancellor of the first circuit, overruling a demurrer to the complainant's bill. The bill was filed by two of the children and legatees of T. Goodyear, deceased, and by the surviving husband of the other child, who was also the trustee of the estate of his deceased wife under an ante-nuptial contract, and who, as such trustee, was entitled to her share of the estate of her deceased father. T. Goodyear, the testator, died in 1830, and by his will directed his executrix and executors to sell his real and personal property, except his furniture, which he gave to his widow, and his real estate in the city of New-York. And he directed his executrix and executors, after paying his debts, to invest the proceeds thereof upon bond and mortgage on interest. And he gave one moiety of his estate to his son Cornelius, subject to a provision for the widow out of the same, and the other moiety to his two daughters, Sally Anne and Eliza Jane, equally; leaving the estate in the hands of the executrix and executors in trust for the children until they should become of age. He appointed his widow and Thomas Bloodgood, W. W. Cowan and A. Goodyear, the executrix and executors; the last of whom refused to accept the trust, and died during the lifetime of T. Bloodgood. The widow was joined in the letters testamentary with Cowan and Bloodgood, but never acted in the execution of the trust, and died in 1831, leaving her three children her only heirs and next of kin. Cowan died in 1834, leaving Bloodgood, who died in 1843, the sole surviving executor. Sally Anne became of age in 1832, and died in 1841, leaving three children surviving, and her husband, one of the complainants, who was entitled to her share of her father's estate, as the trustee thereof under the ante-nuptial contract. The other daughter became of age in 1834, and in the same year intermarried with the complainant, C. Lansing. And the son of the testator became of age in 1837. The bill in this cause was filed against the executor of T. Bloodgood, the last surviving executor of T. Goodyear, deceased, for an account of the estate of the latter which had come to the hands of T. Bloodgood, as such surviving executor and as the surviving trustee of such estate; and the children of the deceased daugh-

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ter were also made parties. The bill charged, among other things, that all the debts and funeral expenses of the testator, T. Goodyear, had been fully paid; that certain moneys which were received by Bloodgood, were not included in the inventory, and had not been accounted for by him; that Bloodgood, in June, 1831, received of Cowan \$1750 on a bond and mortgage which moneys belonged to the estate, but were never accounted for to the complainants; that he rented the real estate in the city of New-York, but lost the rents by his negligence; and that Cowan and Bloodgood sold real estate of the testator's in Pennsylvania, and that he received the proceeds of such sale but had never accounted for the same. The bill therefore prayed for an account of these several matters, and that so much as might be found due to the complainants, should be paid to them by the defendant out of the estate of T. Bloodgood, deceased, in the hands of the defendant as the executor of his deceased father, in the proportions to which the several complainants were respectively entitled. The defendants demurred to the bill, upon the ground that the complainants did not show that letters of administration *de bonis non*, with the will of T. Goodyear annexed, had been granted to them, or any of them. The defendant also urged certain other objections *ore tenus*, which are considered in the opinion of the court.

*M. S. Bidwell*, for appellant. If the facts stated in the bill are true, the complainants are not the proper persons to file a bill. It should be filed by the personal representative of the original testator, Thadeus Goodyear. This is the general rule. If there be any exception it is in the case of a collusion of such representative, and perhaps of his insolvency. Nothing is stated in the bill to take the case out of the general rule, or to bring it within any exception. But if it came within such exception, or if, for any reason whatever, the bill could be filed by the complainants, such personal representative was at all events a necessary party. Without him there cannot be a complete and final settlement of the estate, or a full discharge of the defendant. If it be a fact that there is at present no such representative, the

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bill will not on that account be good. The complainants should have taken administration de bonis non, or procured the grant of it to some other person. No decree in this case will be a bar to a future suit (if one should be brought) by an administrator de bonis non, hereafter appointed. The personal representative of W. W. Cowan is a necessary party to such bill; as without him a final and complete settlement of the estate cannot be made. E. E. Higgins is a necessary party; the delegation of his trust being void. For the same reason W. P. N. Fitzgerald is improperly made a party to the bill. Even if the complainant could file a bill against the defendant, to charge him for the negligence of Thomas Bloodgood, as executor of Thadeus Goodyear, yet this bill is bad for multifariousness in seeking an account of the assets administered by him.

*E. Norton*, for respondents. The money which this bill is filed to recover, having once been collected and received by the representative of the testator, is no longer a debt due to the estate, to be collected by its representative; but is money due to the legatees, and can only be sued for by them. (*Cheatham's adm'r v. Burfoot*, 9 Leigh, 580, 594. *Neale v. Hagthorp*, 3 Bland's Ch. Rep. 551, 562. *Lawrence's adm'r v. Lawrence's ex'r*, Litt. Sel. Cas. 123. *Sparhawk v. Adm'r of Bull*, 9 Verm. R. 41. *Douglass v. Satterlee*, 11 John. R. 16. *Graham v. Torrence*, 1 Ired. Eq. 210. *Foster v. Wilber*, 1 Paige, 537. *Dakin v. Demming*, 6 Id. 95.) If the legatees have the right to sue, the payment to them will be a bar to any future claim; and as, under the facts in this case, nobody else can have any claim, a final settlement can be made in this cause without having a representative of the estate before the court. (*Hyde v. Stone*, 7 Wend. 334.) No claim being made in this bill against any of the co-executors, and it not appearing that there is any thing due from their estates, it was not necessary to make their representatives parties. (*Gable v. Andruss*, 1 Green's Ch. Rep. 66.) The validity of the conveyance by Higgins to Fitzgerald, will not be decided collaterally in this suit; and whilst it remains in force, the latter is a proper party. All the

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matters in this bill relate to a single subject, to wit, the liability of Bloodgood for his acts as executor of the will of Goodyear, and the bill is not multifarious merely because he is charged both for negligence in collecting and negligence in paying. If this bill cannot be sustained by the complainants in their character of legatees, the suit will be suspended, and they allowed to take out letters de bonis non, and amend the bill accordingly. At the same time they may be allowed, if necessary, to amend, so as to avoid the objection of multifariousness, and to substitute Higgins for Fitzgerald, and bring in the representatives of Cowan and all the parties interested in the estate of T. Bloodgood. (*Humphries v. Humphries*, P. Wms. Rep. 347. *Jenkins v. Freyer*, 4 Paige, 47.)

THE CHANCELLOR. The objection that the complainants have not taken out letters of administration, with the will annexed, of the goods of T. Goodyear deceased unadministered, is not well taken. This is not a bill to recover a debt due to the estate of the testator, Goodyear, which must be sued for by the personal representatives of the latter. But it is a bill by his legatees, and those who have succeeded to their rights, to recover from the personal representative of the surviving executor of Goodyear moneys which were in the hands of such executor, and which he held as trustee for the complainants, at the time of his death, and which he ought to have accounted for and paid over to them. The persons beneficially entitled to the fund have therefore properly filed their bill, in their own names, to recover from the executor of Bloodgood the moneys which were owing to them from his deceased testator. The cases cited by the counsel for the appellant are cases where claims were made to recover debts due to the personal representatives of the decedent, or property belonging to the estate, which had been taken or appropriated by strangers without authority of the rightful representatives; or to charge the estate to the prejudice of the rights of the executor, or administrator, as such. Thus in the case of *Phelps v. Sproule*, (4 Sim. Rep. 318,) the complainant made a claim as heir at law of the decedent, against the personal repre-

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representative of the latter, to have the purchase money of land, bought by the testator in his lifetime, paid out of his personal estate. The bill was therefore properly filed against Betsey Olive, who was administratrix with the will annexed, of the testator. As she was also the executrix of J. S. Olive, who had possessed himself of the estate of W. Phelps, the original testator, without making probate of the will, the complainant prayed that Betsey Olive might, in her character of executrix of J. S. Olive, account for the property which had come to the hands of the latter in his lifetime. But upon her death, the right to call her executor to account, as the executor of the executrix of J. S. Olive, for the estate of the original testator which had been wrongfully taken by J. S. Olive, devolved on Prior, the administrator with the will annexed of W. Phelps, the original testator; and it did not belong to the heir at law of the latter, who was claiming to have the personal estate applied to the payment of the debt due by him for the purchase money of the lands which had descended to the complainant as heir. And as there was no collusion charged between Prior, the representative of the estate of Phelps, and Sproule, the representative of the person who had appropriated the funds of that estate without authority, the complainant, whose claim was against the representative of the estate of Phelps alone, could not revive his suit against Sproule as the substituted executor of J. S. Olive.

Nor was it necessary in the case under consideration, that the administrator with the will annexed of T. Goodyear should be made a party to the suit, in any form. The averment in the bill that the debts and funeral expenses of the decedent have been fully paid, shows that the legatees alone have an interest in compelling the executor of Bloodgood to account for and pay over to them their moneys which Bloodgood had received and misapplied in his lifetime. Neither is the objection that the personal representatives of Cowan are not parties to this bill well taken. The whole charges in the bill relate to the negligences and defaults of Bloodgood alone; except as to the neglect to inventory the whole property. And, as Bloodgood was the surviving executor, the legal presumption is that all the property not inven-



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toried, and which had not been duly administered at the time of the death of Cowan, must have gone into the hands of Bloodgood as such survivor.

Higgins, the trustee under the post-nuptial contract of Mrs. Fitzgerald, was not a necessary party ; and his conveyance of the trust fund to the complainant Fitzgerald, so far as the personal estate was concerned, was fully authorized, under the circumstances stated in the bill. As to the real estate, it was conveyed upon a trust not authorized by the revised statutes, and therefore no estate whatever vested in the trustee. If the trust is correctly stated in the bill, the legal estate remained in Mrs. Fitzgerald, so far as the land was concerned, and descended to her children at her death ; subject to her husband's estate as tenant by the curtesy. The personal estate, however, vested in Higgins originally, as her trustee, subject to her power of appointment. But upon her death without making any appointment thereof, it would belong to her husband, under the statute of distributions. Higgins then, with Fitzgerald's assent, could lawfully convey it to him in trust for his children, instead of transferring it to him absolutely and for his own benefit ; as he was authorized to do. And the cestuis que trust, under the conveyance from Higgins in trust for the children of Fitzgerald, being parties to the suit, there is no danger that any person can hereafter disturb the account which may be taken in this suit, against the executor of Bloodgood, for that share of the fund which has come to the hands of his testator.

The decretal order appealed from must therefore be affirmed.

## THOMPSON vs. ELLSWORTH and others.

The 80th section of the title of the revised statutes, relative to writs of error and appeals, which declares that an appeal shall not be effectual for any purpose, until a bond to the adverse party in the penalty of \$250, or a deposit of money, as security for the costs upon the appeal, shall be given or made, is broad enough, it seems, to cover any appeal from an order or decree of the court of chancery, whether such order or decree was made by the chancellor or by a vice chancellor; unless the case is otherwise provided for in the title of the statute relative to the court of chancery, which authorizes the chancellor to regulate such appeals by general rules.

That section of the statute is not inconsistent with the provisions of the 60th section of the title relative to the court of chancery; but may be considered as a super-added requisite, to render the appeal valid and effectual.

The adverse party, within the intent and meaning of the 80th section of the statute, and of the 116th rule of the court of chancery, means the party whose interest, in relation to the subject of the appeal, is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal. And where two or more persons have a common interest in resisting the reversal of the decree, or the modification which is sought for by the appellant, a joint bond to all of those respondents is a sufficient compliance with the statute and the rule of the court relative to appeals. It is not necessary, in such a case, for the appellant and his sureties to execute separate appeal bonds to each of the respondents.

But where there are several respondents having entirely distinct and conflicting interests in relation to the object sought for by the appeal, separate appeal bonds should be given, to make the appeal valid and effectual in reference to such adverse parties respectively.

Where a bond or other security is taken in the name of a married woman, during coverture, the husband may elect to treat it as his own property, and may bring a suit thereon in his own name; or, he may treat it as the property of the wife, and bring a suit in the name of both.

A defendant in a foreclosure suit is not entitled to have set-off, against the mortgage debt, an unliquidated claim for damages upon an injunction bond which was given subsequent to the commencement of the suit.

THIS was an application by the complainant to dismiss an appeal, brought by the defendant Ellsworth, from the final decree in this cause, for irregularity.

The bill was filed by the complainant to foreclose a bond and mortgage given, by the defendant Ellsworth, to J. McGregor, and assigned by the latter to the wife of the complainant during coverture. The other defendants claimed an interest in the

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mortgaged premises, under a subsequent mortgage from Ellsworth; the right to which mortgage was contested between those defendants, or some of them, and its validity was not admitted by the defendant Ellsworth. Some of those defendants put in answers, which did not admit the assignment to the wife of the complainant, as stated in the bill, and which rendered it necessary to put in replications and take proof of the facts. Pending the suit, the complainant applied for and obtained an injunction to stay waste, upon giving a bond for the damages which might be sustained by the defendant Ellsworth; pursuant to the 31st rule of the court of chancery.

Upon the hearing before the vice chancellor, Ellsworth claimed to offset against the amount due upon the mortgage, the damages which he alleged he had sustained by reason of the injunction. He also insisted that the complainant was only entitled to the costs allowed by the statute in cases where the bill is taken as confessed, or where the answer of the defendant admits the rights of the complainant as stated in his bill. It was also insisted, upon the hearing before the vice chancellor, that the wife of the complainant, in whose name the assignment of the mortgage was taken, was a necessary party to the suit. The vice chancellor overruled all these objections, and made the usual decree for a foreclosure and sale of the mortgaged premises, and to pay the complainant's debt out of the same, and to bring the surplus, if any, into court; and a decree over against Ellsworth, the mortgagor, for the deficiency, if there should be any.

The defendant Ellsworth afterwards applied to the vice chancellor for a rehearing as to the costs. He insisted that if the complainant was entitled to full costs, the same should not be charged upon him, directly or indirectly; inasmuch as the extra costs had been produced by the answers of the other defendants, and not by his own answer which admitted all the material facts stated in the bill. That application was denied, upon the ground that the other defendants, who might, as between Ellsworth and them be charged with the costs if the decree was varied in respect to costs, had not received notice of

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such application for a rehearing. The defendant Ellsworth thereupon appealed from the whole decree. And upon such appeal, he executed a bond to the complainant and five of his co-defendants, jointly, in the penalty of \$250, for the costs of the appeal; and a separate bond to the complainant, to pay the value of the use of the mortgaged premises, and as a security against the commission of waste.

*E. H. Rosekrans*, for the complainant.

*J. Ellsworth*, defendant, in person.

THE CHANCELLOR. Whatever may be the merits of the appeal in this case, it cannot be dismissed if the appellant has complied with all the requirements of the statute and the rules of the court, to make the appeal effectual. It therefore becomes important to inquire whether the appeal bond in this case is in the proper form.

It was suggested, upon the argument of this motion, that the chancellor had not the power to require any security for costs to be given upon an appeal from a decree or order of a vice chancellor; but only to prescribe, by general rules, what should be necessary to make the appeal a stay of proceedings. The construction which was given to the statute on this subject, however, immediately after it went into effect in 1830, was otherwise; and it is too late now to raise that question in this court. Besides; the 80th section of the title of the revised statutes, relative to writs of error and appeals, appears to be broad enough to cover an appeal from any order or decree of the court of chancery, whether made by the chancellor or by a vice chancellor; unless the case is otherwise provided for in the title relative to this court, which authorizes the chancellor to regulate such appeals by general rules. It is true, the 60th section of the last mentioned title, (2 R. S. 178,) states that an appeal, from a decree or order of a vice chancellor, shall be made by serving notice thereof on the solicitor of the adverse party, and on the register, assistant register, or clerk, with whom the order or de-

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ree appealed from, was entered. But that is nothing more than was required by the rule of this court in reference to appeals, to the court for the correction of errors, at the time the revised statutes were adopted. The 80th section of the title relative to writs of error and appeals, (2 R. S. 605,) which declares that an appeal shall not be effectual for any purpose until a bond to the adverse party in the penalty of \$250, or a deposit of money, as security for the costs upon the appeal, shall be given or made, is not inconsistent with the provisions of the 60th section of the title relative to the court of chancery, but may be considered as containing a superadded requisite to render the appeal valid and effectual.

The adverse party, within the intent and meaning of this 80th section and of the 116th rule of this court, means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal. And where two or more persons have a common interest in resisting the reversal of the decree, or the modification which is sought for by the appellant, a joint bond to all of those respondents will undoubtedly be a sufficient compliance with the statute and the rule of this court in relation to appeals. It is not necessary, therefore, for the appellant and his sureties to execute separate appeal bonds, to each of the respondents, in such a case. But where there are several respondents who have entirely distinct and conflicting interests in relation to the object sought for by the appeal, I think separate appeal bonds should be given in order to make the appeal valid and effectual in reference to such adverse parties respectively.

Here, the appeal is from the whole decree, and the complainant alone is interested in resisting the appellant's claim to have it entirely reversed. He is also the only respondent who is interested in opposing the appellant's claim to an offset, and to have the costs of the complainant limited to the allowance prescribed by statute where the rights of the complainant, as stated in the bill, are not denied or contested. And as to all of these objects of the appeal, the other respondents have a common in-

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terest with the appellant, in favor of the success of his appeal. For, in the one case, the complainant's suit would be defeated altogether, and in the other, the surplus proceeds of the sale of the mortgaged premises, which they claim an interest in by virtue of the subsequent mortgage, would be relieved from the charge of a portion of the complainant's debt and costs; which are now chargeable upon the fund under the decree appealed from. On the other hand, so far as the appellant seeks for a decree over against his co-defendants, for the extra costs, to which he, or his interest in the mortgaged premises may have been subjected by the defence set up in their several answers, the complainant has no interest in the question. And such co-defendants are alone the adverse parties to the appellant; and they, only, are interested in resisting the modification of the decree in that respect. The complainant, therefore, was entitled to a separate appeal bond, to himself alone, for the security of his costs and damages in case the appeal as to him should be unsuccessful. And a joint bond to him and the other respondents, whose interests were adverse to his so far as he had any interest in resisting the claims of the appellant, was irregular.

This however is a case in which the appeal bond is amendable, if the appeal is meritorious. I have therefore looked into the case to see if there was any probability that this appeal could be successful, so far as concerns the rights of the complainant. The vice chancellor was clearly right in holding that the wife of the appellant was not a necessary party. The cases of *Borough v. Moss*, (10 Barn. & Cress. Rep. 558,) and *Searing v. Searing*, (9 Paige's Rep. 283,) and the other authorities referred to in the opinion of the vice chancellor, recognize the principle as settled, that the husband may bring a suit in his own name in such a case. The law on that subject is, that if a bond or other security, is taken in the name of the wife, during coverture, the husband may elect to treat it as his own property, and may bring a suit thereon in his own name; or he may treat it as the property of the wife and bring a suit in the name of both. The court below was also right in refusing to set off against the mortgage debt, the unliquidated claim for damages upon the injunc-

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ion bond which was given subsequent to the commencement of the suit.

And as between the complainant and the defendant Ellsworth, the decree was right in relation to costs. The assignee of the first mortgage was bound to make the holders of the second mortgage, or those claiming interests therein, parties to his bill of foreclosure, which would not have been necessary if the appellant had performed his contract by paying the mortgage money and interest, when the same became payable. Nor could the complainant prevent such parties from putting in answers denying all knowledge of the assignment of the mortgage to his wife, as stated in the bill; thus rendering it necessary for him to file replications to such answers, and to prove the due execution of the assignment. This occasioned the extra costs, beyond the statutory allowance, where the right of the complainant, as stated in his bill, is admitted by the defendants, in their answers, or by suffering the bill to be taken as confessed. As between the complainant and the mortgagor, the former was entitled to a decree against the land, for the payment of his full costs, as well as the mortgage debt, and to a decree over against the mortgagor, upon his bond, in case of a deficiency. Nor could the court rightfully compel him to look only to the personal liability of any of the defendants, for a portion of his necessary costs and expenses of foreclosure; or to litigate the question with those defendants as to their personal liability for the extra costs occasioned by their answers. The proper course for the defendant Ellsworth, if he supposed his co-defendants ought to be charged personally with a portion of those costs, would have been to ask for a decree over against them, in his favor, for the costs to which either himself or his property had been subjected by their fault.

Whether or not he is entitled to such a decree, is a question upon which I express no opinion at this time. For the complainant is not interested therein adversely to the appellant; and the co-defendants of the latter are not asking to have the appeal dismissed as to them. The dismissal of the appeal as to the complainant will not prevent the court from making a decree

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over against the other respondents, upon the other branch of the appeal, if such a decree is proper and the appeal is properly brought for that purpose. But in the meantime, the complainant will have the right to proceed and carry the decree into effect so far as regards himself.

The appeal, so far as it relates to the complainant and his rights, must be dismissed for irregularity, with costs to be taxed; to be paid by the appellant. And the complainant is to be at liberty to proceed and enforce his decree against the mortgaged premises, and against the defendant Ellsworth personally for the deficiency, if any there should be; but without prejudice to the rights of the appellant as against the other respondents in this appeal.

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 D. and N. S. COLLIN, executors, &c. vs. COLLIN and others.

Where the testator, by his will, disposed of his residuary estate as follows: "I give and bequeath all the rest and residue of my personal estate to all my grandchildren, to be distributed among and paid to them, share and share alike, by my executors in manner and form following: to be vested in good securities bearing interest, and to be paid to them severally as they arrive at the age of twenty-one years in equal shares; estimating the whole amount of such residue of my personal estate at the time of each payment, and thus making an equal distribution of the same among such grandchildren"; and the testator died leaving twenty-three grandchildren, seven of whom were born subsequent to the making of the will; and the testator also left five children, who survived him, and who were living at the time of the filing of the complainants' bill, but none of them had any children born subsequent to the death of the testator; and where at the date of the will, some of the grandchildren were over twenty-one years of age, and others arrived at that age previous to the death of the testator: *Held*, that the proper construction of the residuary clause of the will, was that all the grandchildren of the testator who were in esse at the time of his death, or their legal representatives, and no others, were entitled to share in the residuary estate.

*Held also*, that in order to limit the bequest, in such a case, to those who answered the description of grandchildren of the testator at the time of the making of his will, and to exclude those who answered the description at the time of his death there must be something in the will itself to show that he meant to confine his



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bounty to those who were in esse at the date of the will. For, the will being ambulatory until his death, the legal presumption is that he intended to include all who should answer the description at that time.

*Held further*, that as to the shares of the grandchildren who were of age at the time of making the will, and of those who were of age at the death of the testator, he contemplated the distribution thereof immediately upon his death. And the direction in the will that all of the class shall take equal shares of the residuary estate necessarily excluded those persons, if any there should be, who were not in esse at the period appointed for the first distribution, viz. the time of the testator's death. And that the testator intended that the shares of those who were not then of age should be accumulated, for their benefit, until the next of them became of age; at which time a new distribution should take place; and so on, until the whole fund was distributed among the grandchildren who were in esse at his death.

The general rule is that, in a will of personal estate, the testator is presumed to speak in reference to the time of his death; and not in reference to any previous or subsequent period. A bequest to the children of A. B., as a class, will include all his children in esse at the death of the testator; including children begotten at that time though born afterwards.

It is also a general rule, that where an estate is to be distributed among a class at the death of the testator, those who are in esse at that time, and no others, are entitled to share in the distribution. But where the distribution is to be made among a class, at the death of a particular person, or upon a contingency which may happen at any time subsequent to the death of the testator, all who answer the description of the class at the time appointed for distribution will be entitled to share in the fund.

Where the language of a will indicates a present bequest of the fund, which is to be distributed at a period subsequent to the death of the testator, those who are in esse at the time of his death will take vested interests in the fund, but subject to open and let in others who may come into being, so as to answer the description and belong to the class at the time appointed for the distribution.

But where a fund bequeathed to a class is to be divided equally, among the persons composing it, when they arrive at the age of twenty-one or marriage, only those who shall have been born or begotten when the eldest arrives at the age of twenty-one, or when the first of the class is married, is entitled to share in the fund.

THE bill in this cause was filed by the executors of D. Collin, deceased, to obtain a judicial construction of his will, and for directions for the distribution of his estate among his residuary legatees, under the following clause of his will:

“Eightly: I give and bequeath all the rest and residue of my personal estate to all my grandchildren, to be distributed among and paid to them, share and share alike, by my executors, in manner and form following; to be vested in good securities

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bearing interest, and to be paid to them severally as they arrive at the age of twenty-one years in equal shares; estimating the whole amount of such residue of my personal estate at the time of each payment, and thus making an equal distribution of the same among such grandchildren."

At the time of the death of the testator, in June, 1844, he had twenty-three grandchildren living; seven of whom were born subsequent to the making of the will in 1837. And at the time of his death he had five children who survived him, and who were still living at the time of filing the bill in this cause, more than a year subsequent to his death; but none of them had any children born subsequent to the death of the testator. At the date of the testator's will, three of his grandchildren were over twenty-one years old, and five others arrived at that age previous to his death. The other fifteen were infants, and appeared and put in their answers by their guardian ad litem.

The testator left a very large residuary personal estate; and some of the grandchildren who were born previous to the date of the will, claimed that none of those who were born after that time were entitled to share in the distribution of such estate. Others, of the grandchildren who were born after the making of the will, claimed that all who were in esse at the time of the death of the testator, were entitled to share equally in the residuary estate; but that no grandchildren who might be born at any subsequent time, would have a right to share therein. The executors, however, stated in their bill that some counsel had advised them that grandchildren born at any time after the death of the testator, would be entitled to distributive shares of his residuary estate.

*J. G. Forbes*, for the complainants. Unless there is something in the terms of the will clearly showing a contrary intention, it is a general and well settled rule, that a will of personal property relates to the time of the death of the testator, both as to the legatees and the subjects of the bequests mentioned in the will. (See *Van Vechten v. Van Vechten*, 8 *Paige's Rep.* 116.) Indeed, it would seem impossible to give effect to the

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clearly expressed and unequivocal intention of the testator, in regard to the equality of the shares among the grandchildren, by extending this clause beyond his death, in favor of afterborn grandchildren. It is declared, in explicit terms, that the shares are to be equal, and that each grandchild is to have his, or her, proportion on arriving at the age of 21 years. And with a view to preserve this equality throughout, to each of the legatees, the whole amount should be estimated at the time of each payment. Now it is obvious that this equality cannot be preserved by extending it to those grandchildren who may be born after each payment. Those who first arrive at the age of 21 years, will receive a larger proportion than the subsequent ones, in case of other children being born in the intermediate period; and these proportions will be constantly diminishing by the recurrence of the birth of others, until, perhaps, the portions of the last will be relatively nominal. The intentions of the testator, when clearly expressed, are to be carried into effect. In this clause the testator has plainly expressed his wishes, that each share should be equal. And such wishes would be frustrated by giving any extension to legatees who may be born after the death of the testator. In case of distribution to any one of the grandchildren on arriving at the age of 21 years, of a part, which would be greater than an equal share by the birth of other grandchildren—some provision should exist by way of compelling repayment of the excess. But nothing of this kind can be found in our statutes, or elsewhere. It is possible that when a grandchild was not actually born at the death of the testator, but was begotten, or, as it is expressed in law, was "*in ventre sa mere*" at the testator's death, such child would be entitled to its share of the estate. This case was so decided in *Smart v. King*, (1 *Meigs' Rep.* 149,) and also in *Smith v. Deffield*, (5 *Serg. & Rawle*, 38.) These decisions rest upon the equitable principles of the Roman law, which declares that infants, while as yet in their mothers' wombs, are considered as already brought into the world—whenever the question relates to any thing that may turn to their advantage. It is clear, that the 8th clause cannot be carried beyond this point, and perhaps

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no case of birth of a posthumous child occurred within the usual period after the death of the testator.

*J. R. Lawrence*, for defendants. It would seem by the ~~fore~~ part of the residuary clause of this will, that the testator intended each grandchild to have an equal sum; for he says, "to be distributed share and share alike." But this clearly could not be done; inasmuch as each was to be paid as the devisee became of age, and the fund might, and probably would, ~~increase~~ to the amount of the interest; for it was "to be vested in good securities bearing interest;" or it might diminish by a failure of the securities. The testator therefore proceeds to give the ~~form~~ of the distribution; and he says, "to be paid to them in equal shares, estimating the whole amount of such residue of my personal estate at the time of each payment, and thus making an equal distribution of the same among such grandchildren." I submit that the testator intended the distribution to be made thus:—suppose (and such was the fact) that eight of his twenty three grandchildren were of age at the time of his death, and the amount of the residue of the estate to be divided under this clause of the will was estimated by the executors at \$46,000, or \$2000 apiece. These eight grandchildren would then be entitled to \$2000 each, and the remainder (\$30,000,) the executors would invest in good securities bearing interest until another grandchild became of age. Then, that the executors should estimate the whole amount of such residue, including the increase by way of interest, or deducting for any loss, as the case might be, and paying to the one newly arrived at the age of twenty-one years, one fifteenth part thereof, i. e. his share in the \$30,000 remaining after payment of those who had previously become of age and had been paid off; and so on, as fast as the grandchildren became of age. Now, although this would not pay an equal sum to each, yet it is contended this is what the testator intended by the words "thus making an equal distribution." Surely the youngest grandchildren should be entitled to the interest accruing on their portions, occasioned by the postponement of their payments. Otherwise it would be an exceedingly

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unequal distribution. Then again, it may well happen that those who are first paid may get more than their share, should there afterwards be a loss on the securities, or a fall in the stocks in which it might be invested; and in that case I know of no principle of law, by which they could be made to restore; for at the time they were paid, they were paid only their proportion of the estate as it then was. But the chance is equal, perhaps, for the estate to gain: and to adopt any other construction would render it impossible to carry out the will. And this raises another question. If the court do not see that it is possible to carry out the will, is it not void? And in that case are not all the grandchildren excluded, and does not the estate go to the children of the testator?

Supposing the above is the true construction of the will in respect to the manner of distribution; the next question is, does the will refer only to all the grandchildren born at the date of the will, or does it refer to all his grandchildren living at the time of his death? This court has decided in the case of *Van Vechten v. Van Vechten*, (8 Paige, 104,) that it is a general rule that in a will of personal estate, the testator is presumed to speak with reference to the time of his death; unless there is something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property or subject of the bequest as it existed at the time of making the will. I do not perceive any thing in the will, in this case, to take it out of this general rule. But there may be doubt, perhaps, whether the bequest does not reach grandchildren born after the death of the testator and before the time comes for a division. Suppose none of the grandchildren were of age at the death of the testator; and before any of them arrived at the age of 21 years, other grandchildren are born; are they to be excluded? In other words, does not the will refer to all his grandchildren living at the time fixed for distribution? Those born after the testator's death are the grandchildren of the testator, as much as those born before. And we can hardly suppose that the testator intended, by the words "I give all the rest and resi-

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due of my personal estate to all my grandchildren," to exclude any of them in being at the time fixed for distribution among all his grandchildren. It is true, that a distribution is to be made as they become of age, share and share alike; and this would undoubtedly authorize the executors to pay to one becoming of age, in proportion to the number of grandchildren then in being. But if by the time of a second distribution, others should be born, the amount would then be in proportion to the whole number then in being. In the case of *Ballard v. Ballard*, (1 *Pick.* 41,) a testator devised to his sons, for the term of ten years after his decease, the improvement and income of his farm; and to his grandchildren, the sons and daughters of his said sons and daughters, after the expiration of ten years from his decease, the said farm, &c. to have and to hold to them and their heirs. It was held that this gave a vested remainder to the grandchildren living at the testator's death, subject to open and let in all born afterwards. See also *Annable v. Patch*, (3 *Pick.* 360,) where it was held that when a devise of real and personal estate is made to the testator's daughter and the children of her body, the daughter and the children living at the testator's death, take in common a qualified fee, which will open to let in after-born children, who take by way of executory devise. (See also 1 *Pick.* 147.) These cases show that all the grandchildren living at the testator's death, in this case, took in equal portions, subject to open and let in all born afterwards. And if so, those who have arrived at the age of 21 years, and been paid, cannot be compelled to contribute to the payment to grandchildren afterwards born.

THE CHANCELLOR. The proper construction of the residuary clause of this will is, that all the grandchildren of the testator who were in esse at the time of the death of the testator, or their legal representatives, and no others, are entitled to share in his residuary estate.

The general rule is, that in a will of personal estate, the testator is presumed to speak in reference to the time of his death; and not to any previous or subsequent period. A bequest to the

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children of A. B., as a class, will, therefore, embrace all his children in esse at the time of the death of the testator; including children begotten at that time though born afterwards. (*Rawlins v. Rawlins*, 2 Cox's Cas. 425. *Doe v. Clark*, 2 Hen. Bl. Rep. 399. 2 Ves. jun. 673, S. C.) To limit the bequest in this case to those who answered the description of grandchildren of the testator at the time of the making of his will, and exclude those who answered the description at the time of his death, there must be something in the will itself to show that he meant to confine his bounty to those who were in esse at the date of the will. For, the will being ambulatory until his death, the legal presumption is, that he intended to include all who should answer the description at that time.

Again; the general rule is, that where the estate is to be distributed among a class, at the death of the testator, those who are in esse at that time, and no others, are entitled to share in the distribution. But where the distribution is to be made among a class, at the death of a particular person, or upon a contingency, or at any other time subsequent to the death of the testator, all who answer the description at the time appointed for the distribution, will be entitled to share in the fund. (*Gilmore v. Severn*, 1 Bro. C. C. 582. *Prelsford v. Hunter*, 3 Idem, 416. *Ellison v. Airey*, 1 Ves. sen. 111.) And where the language of the will indicates a present bequest of a fund which is to be distributed at a period subsequent to the death of the testator, those who are in esse at the time of his death will take vested interests in the fund; but subject to open and let in others who may come into being, so as to answer the description and belong to the class, at the time appointed for the distribution.

It has however repeatedly been decided that where a fund, bequeathed to a class, is to be divided equally among the persons composing the class when they arrive at the age of twenty-one or marriage, only those who shall have been born or begotten when the eldest arrives at the age of twenty-one, or when the first of the class is married, is entitled to share in the fund. (*Andrews v. Partington*, 3 Bro. C. C. 401. *Prescott v. Long*, 2 Ves.

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*jun.* 689. *Hoste v. Pratt*, 3 *Idem*, 730. *Whitbread v. Lord St. John*, 10 *Idem*, 152. *Gilbert v. Boorman*, 11 *Idem*, 238.)

In the case under consideration, eight of the grandchildren were of age at the death of the testator ; and three of them at the time of making his will. He therefore contemplated the distribution of the shares of those grandchildren immediately upon his death. And as he directs that all of the class shall take equal shares of the residuary fund, he necessarily excludes those, if any there shall be, who were not in esse at the time appointed for the first distribution ; which in this case was the time of his death. The shares of those who were not then of age are to be accumulated, for their benefit, until the next becomes of age ; and then a new distribution is to take place, and so on, until the whole fund is distributed. In this way an equal distribution of the fund will be made among such grandchildren ; those who take upon the death of the testator getting their shares immediately, and those whose payments are deferred, receiving the accumulated interest during the suspension of payment ; so as to produce perfect equality among all of the twenty-three grandchildren who are entitled to share in the distribution of the fund. For, the legacies being vested at the death of the testator, if any of the legatees die before the time arrives for the payment of their shares, their representatives will be entitled to the same.

Again ; it would be impossible to carry into effect the intention of the testator, in reference to the accumulation of the interest for the grandchildren, during their respective minorities, upon any other construction of the will. For, by the provisions of the revised statutes, accumulations of interest or income cannot be made except for the benefit of infants who are in esse at the time the accumulation is directed to commence. (1 R. S. 773, §§ 3, 4.)

A decree must therefore be entered, declaring the construction of the residuary clause of the will to be, that all of the grandchildren who were in esse at the death of the testator, and no others, are entitled to share in the residue of his personal estate ; and directing the complainants immediately to distribute to each of the grandchildren who is now of the age of twenty-one, the



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one twenty-third part of such residuary estate, with the accumulations thereon since the death of the testator; and that they distribute to each of the grandchildren, as they arrive at the age of twenty-one years respectively, or to their representatives, the one twenty-third part of such residuary estate, and the accumulations thereon up to the time of such first distribution which is now to take place, with their respective shares of all future accumulations, according to the directions of the will. And any of the parties interested are to be at liberty to apply, from time to time, for further directions to carry this decree into full effect.

The costs of the complainants, and of the guardian ad litem of the infant defendants, up to and including this decree, are to be paid by the executors, out of such residuary estate, before distribution. And the costs of any future applications which may hereafter be made, are to abide the further order of the court.

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COOK vs. COOK.

A suit for a divorce, on the ground of adultery, is terminated by a final decree directing a divorce with or without costs, and which contains no reservation of a right to the wife to apply for alimony. And the wife, after her re-marriage to another husband, in conjunction with such second husband, may apply to the court, by petition, for an order giving to her the care and custody of a child of the first marriage, without reviving the suit.

The power given to the court of chancery, by the statute, in a suit for a divorce, to direct as to the care and custody of the children, either before or after the final decree, is a mere collateral power.

An agreement between husband and wife, as to the custody of their children, made previous to a decree for divorce, will not have a controlling influence upon the decision of the court with respect to the care and custody of such children.

The object of the statute, in giving to the court of chancery the power to direct which of the parties, in suits for divorce, shall have the care and custody of the minor children, where the husband is the guilty party, was not to gratify the wishes of the parents, but to protect and provide for the children of the marriage.

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THIS was an appeal by the defendant from an order of the vice chancellor of the seventh circuit, giving to the mother the custody of one of the infant children of the parties.

The complainant filed her bill for a divorce, on the ground of the adultery of the defendant. The bill was taken as confessed for want of an answer; and the complainant having established the fact of adultery, before the master upon a reference, a decree for a divorce was entered therein, in the usual form, prohibiting the defendant from marrying again during the lifetime of the complainant. There were two children of the marriage, at the time of the divorce in 1842, a son of the age of five years, and a daughter nearly three years old. No direction was given in the decree as to the custody of these children, there having been a previous agreement between the parties, as alleged by the mother, that she should have the custody of the daughter and the defendant the custody of the son. Shortly after the divorce the complainant married again, as she was authorized to do by the decree. The infant son continued to reside with his father and grandfather, and the daughter lived with, and was taken care of and provided for by the mother, and her new husband, until September, 1845, when the father, under pretence of taking his daughter out to ride merely, clandestinely carried her away with him to the city of New-York; to which place he had then removed. The complainant and her husband thereupon presented a petition, entitled in the suit, to the vice chancellor of the seventh circuit, before whom the proceedings for the divorce were had, stating these facts, and asking for the care and custody of this child. And to this petition they annexed affidavits showing that the defendant continued to carry on an adulterous intercourse in the city of New-York, and that he was in the habit of associating with common prostitutes there. The defendant procured affidavits to be used in opposition to the application, impeaching the characters of some of the deponents whose depositions were annexed to the petition. But in his own affidavit he did not deny the truth of the specific charges of misconduct made against him in the petition, and supported by those depositions. He however produced affidavits to impeach the conduct of the complainant

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previous to the decree for a divorce, and to show that she had sometimes exhibited violent acts of passion towards her present husband since she was married to him.

The vice chancellor awarded the care and custody of the infant daughter to the mother, until further order, and enjoined the defendant from removing or interfering with it, without the consent of the mother, until the further order of the court. From that decision the defendant appealed to the chancellor.

*L. R. Marsh*, for the appellant. The motion is made in this cause, and if it is not a proper motion in this cause, or if the cause is not in a position to enable such a motion to be made, it cannot be sustained. The cause is not in a position to enable the motion to be made. It has abated by the marriage of the complainant. (*Quackenbush v. Leonard*, 10 *Paige*, 131. *Mitford's Ch. Pl.* 57. *Story's Eq. Pl.* 289, § 354.) And it can only be revived by bill of revivor. (10 *Paige*, 131.) The cause must be revived before any application can be made for the custody of the child. The two things cannot be blended. There was nothing in the alleged agreement that destroys the father's right to the child. There was no agreement in point of fact. Or, if there was any such agreement, in fact, made, it was void in law. (1) As being for a future separation. (2) There was no trustee, or third contracting party. (3) An agreement between husband and wife is void. (4) It was to procure a divorce. (5) There was no consideration. If there had been a valid agreement, in fact, made, the court are not bound by it; but will consult the welfare of the child. The father is entitled, by the law, to the custody of his child. There are no facts in this case which override the rule of law, and prove the mother to be the proper custodian of the child. It is true, the father is charged with adultery. But the charges in the petition and affidavits are disproved. The evidence for the decree of divorce was insufficient. The mother cannot avail herself of this, if true, for she is in *pari delicto*. The mother is utterly unfit to have the charge of the child—and the father is a proper person

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to have that charge. The child is not of tender age, or of sickly habits, so as to require the care of a mother.

*B. Davis Noxon & D. D. Hillis*, for respondent. The statute has authorized the court, in case of a divorce, to make such order in regard to the custody of the children as their welfare may seem to require; and this may be done pending the suit, at the decree, or afterwards. (2 R. S. 148.) An agreement having been made pending the suit for a divorce, and in reference to it, between the parties, in relation to the custody of the children, each parent taking one, no order was asked for, or made by the court, touching their custody. And the court will now entertain the matter, and make the order in the original suit. The agreement touching the care and education of the children, made pending the suit, while the parties were living separate, without the least prospect of living together again, in view of a divorce, upon good consideration, and an actual delivery of the children after the divorce, one to each of the parents, by virtue of the agreement, and an acquiescence by both parents for several years, in the custody of one being in each of the parents, is valid, and a flat bar to the claim of the defendant to the female infant. The court of chancery will enforce this agreement. (2 East, 283. *Lister's case*, 8 Mod. 22. 1 *Strange*, 478. *Mary Mead's case*, 1 Burr. 542. 2 Vern. 67. 1 Jac. 245. 2 Ventr. 217. 4 Vin. Abr. tit. *Baron and Feme*, 172 to 179. *Sealey v. Crawley*, 2 Vernon, 386. *Angin v. Angin*, Prec. in Chan. 496. *Guth v. Guth*, 3 Bro. C. C. 614. *Powel v. Charn*, 2 Id. 499. *Matter of McDowles*, 8 John. 328, 353. *Mercem's case*, court of errors, 25 Wend. 64; see opinions of the Chancellor and Senator Paige, 92, 98. 2 Atk. 511. 2 Barn. & Cress. 547. 2 Sim. & Stuart, 372.) If the agreement is not a bar, it is the admission of the husband that the complainant ought to have the custody of her female child. This is a continuing admission, acting *in præsentia* up to the present time. This agreement, drawn up, signed and solemnly delivered by the defendant to the counsel for the complainant, and by him to her, being executed by the complainant in his favor by surrendering to him

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her oldest child, and the payment of \$100 to the defendant, he is estopped from committing a fraud by denying its validity, as to this child; and no tribunal should aid the defendant in violating an agreement thus solemnly made, especially after it has been quietly acquiesced in for several years. The father has no paramount inalienable right to take the children from their mother, regardless of their age, sex and circumstances. This court will exercise its discretion, if the agreement is not binding, and act on the custody of the child with the best regard to its health, comfort and welfare. (5 Binn. 520. *State v. Smith*, 4 John. Ch. 80. 8 John. 253. 13 Id. 418.) The old English cases establish this doctrine; and it was recognized as late as 1827, in *Wellesly v. Duke of Beaufort*, (2 Russ. Ch. Rep. 639.) The act of our legislature (2 R. S. 82,) has settled the rights of the mother to be different from what has been asserted to be the law; especially by the supreme court in some cases. The father in this case has been divorced for adultery, and he is debarred by the decree from ever marrying again. The child cannot, therefore, have even a step-mother; and having no paternal grandmother, she is to be without the care of a female parent, if the defendant's claims are sustained. By common consent, in accordance with the dictates of nature and humanity, the mother is regarded as the guardian by nature and nurture of young female children, and as being better calculated than the father to nurse and protect them in early childhood, both in sickness and in health. (*Rex v. Wangford*, 1 Lord Ray. 395.) If a husband, by acts of adultery, forfeits his conjugal rights and renders himself an unfit companion for his wife, shall he be permitted to add injury to injury and take from her arms her helpless offspring? No tribunal, governed by the common feelings of humanity, will take her female child from her, under such circumstances; especially as the child has no property; and this is a guardianship for nurture only. The present husband of the complainant is able to support and educate the child, and has expressed a willingness to enable the complainant to do so, to the extent of his means. He has no children, and this child will inherit his property.

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THE CHANCELLOR. The objection that the complainant had not revived the suit, in the name of her husband and herself, subsequent to her re-marriage, was an objection of form merely. It could not therefore be insisted on here, under the conditions upon which the appellant has been permitted to have the decree of affirmance opened ; even if it was valid as an objection before the vice chancellor. I also think the objection was untenable in reference to the particular application which was made to the vice chancellor. The suit itself was in fact terminated by the final decree ; as no costs were awarded, and no right was reserved to the wife to apply for alimony for her own support. The power given to the court, by the statute, to direct as to the care and custody of the children, either before or after the final decree, from time to time as may be necessary, appears to be a mere collateral power. And I can see no possible benefit which could result to any one from a formal revival of the suit, in reference to such a proceeding. All that can be necessary either in form or substance, is that the husband, whom the complainant has married since the decree for a divorce, should join with her, in the petition for the care and custody of her children ; so as to render himself liable to the defendant for costs if the application is unsuccessful. And that has been done in this case.

So far as respects the defendant himself, he admits the various acts of adultery, and with different persons, as charged in the bill. And as he does not attempt to deny them at this time, they must be taken to be true for the purposes of this application ; although but one act was proved before the master upon the reference. That however would not be sufficient of itself to exclude him, absolutely and forever, from the care and custody of his infant children, if the court could be satisfied that he had subsequently abandoned his licentious intercourse and become a reformed man. Nor should the agreement as to the custody of the children, made previous to the decree, have a controlling influence upon the decision of the court, in such a case. The object of the statute in giving the court the power to direct which of the parties shall have the care and custody of the

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minor children, where the father has so conducted himself as to justify either an absolute or a limited severance of the marriage tie, was not to gratify the wishes of the parents. It was for the protection of the children, who by the misconduct of one parent had necessarily become half orphans. Besides, it would be a dangerous practice to allow parties to agree between themselves as to the custody of their children, in such a case, previous to a divorce. It would lead to collusion, in furnishing causes for divorces, if bargains of this kind could be made beforehand which the court was bound absolutely to sanction and carry into effect. For this reason this court uniformly refuses to sanction an agreement by the wife, in anticipation of a divorce for the alleged misconduct of the husband, to take a stipulated sum, in lieu of her claim for alimony; but requires evidence that it is a reasonable allowance, in reference to the amount of his property, or reserves to her the right to go before a master upon the question of the amount of alimony after the decree has settled her right to a divorce.

From the affidavits annexed to the petition I am satisfied that an agreement in writing was made between the parties, and substantially in the form stated in the petition of the respondents; and that the \$100 was paid to the defendant, by some one, to induce him to consent to the written agreement which was then made. But I am not satisfied that this arrangement was not directly connected with a further understanding, between the parties, that the wife should be permitted to obtain a divorce from the defendant without opposition. No attempt at a defence could have been made by the defendant, for the reference to the master was within six weeks after the bill was sworn to. And the agreement alluded to was probably made before the commencement of that suit, as the petitioner and her witnesses refrain from saying that the suit was pending at the time that agreement was made. But the adultery, proved by the conscientious young woman who declined to name the adulteress for fear of injuring her character, could not have been committed in pursuance of that agreement. For it is sworn, in the bill, that the defendant committed adultery with that witness in

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Albany, in February, 1841, which was more than six months before the final separation of the parties. And the witness saw the adultery committed with the unnamed individual in the winter of 1841, in the city of Albany. The only defence, therefore, which the defendant probably could have made was the alleged misconduct of the complainant, for which he had brought the suit against her present husband. The circumstances under which that agreement was made induce me to lay it entirely out of view in deciding this appeal. And I put my decision upon the question as to what is most for the interest of the child, upon the facts which were before the vice chancellor at the time the order appealed from was made.

That the defendant himself had committed numerous acts of adultery with different persons, previous to the decree for divorce, is distinctly charged in the bill, and not denied by him in any form, either in that suit, or upon the application to the vice chancellor, by the mother, to obtain the custody of the child. One of those adulteries was also proved before the master upon the reference. And the affidavits which were served upon him with the notice of the presenting of the petition, show that his libidinous intercourse with abandoned women is still continued. He had a full opportunity to deny the particular facts stated in those affidavits if he could deny them with safety, but has not done so. I must, therefore, for the purposes of this application, consider the allegations as true; notwithstanding the attempt to discredit the witnesses, by the *ex parte* affidavits of others who do not pretend to disprove the particular facts sworn to on the other side. It is, therefore, evident that the defendant is not a proper person to be entrusted with the care and education of his infant daughter without the superintending care of her mother.

On the other hand, the conduct of the mother previous to the divorce, if the affidavits of the defendant and some of his witnesses are to be credited, was such as to lead to a suspicion that she too was unfaithful to the marriage bed. But no one swears to any thing amounting to certain or even *prima facie* evidence of guilt in this respect; although her imprudence was such as



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to induce some of her neighbors to distrust her. Since the divorce, however, there is nothing to excite a suspicion that she has not conducted herself properly in this respect. The only thing which is charged against her since that time is, that she sometimes gives way to violent ebullitions of passion towards her present husband. But there is nothing to create even a suspicion that this child had not been kindly treated, and properly supported and cared for, both by its mother and step-father, for the two years and a half which it was allowed to remain with them subsequent to the decree. On the contrary, it appears that the child, while she remained with them, was kindly treated, comfortably clothed and otherwise provided for, and furnished with the means of instruction suitable to her age. The vice chancellor was therefore right in awarding the custody of this child to the mother, and without reference to the agreement which was made previous to the divorce.

The order appealed from must be affirmed. And the appellant must pay to the respondents, Allen and wife, their costs upon this appeal, to be taxed.

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SCOUTEN vs. BENDER.

Where a complainant, or appellant, in a suit in the court of chancery, assigns his interest in the subject matter of the suit, *pendente lite*, either absolutely or conditionally, and obtains a re-assignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the court by a bill in the nature of a bill of revivor. But in such a case the assignor who has subsequently been restored to his former rights, may proceed in the same manner as if no such assignment had been made.

THIS was an application, on the part of the defendants, to dismiss an appeal, by the complainant, from a decree of the vice chancellor of the seventh circuit. The decision of the vice chancellor which was appealed from was made previous to the 18th of July, 1844. And the complainant, supposing that the decree had been entered in conformity with that decision, appealed from the decision on the last mentioned day, and gave

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the proper appeal bond, and a notice of the appeal. On the same day, and after the appeal, he made an agreement with his solicitors to assign his claim to them, in payment of their costs, and that the appeal should be prosecuted at their risk; but with liberty to the complainant to redeem, at any time before the decision of the chancellor upon the appeal, on payment of such costs. Shortly after the appeal was entered it was discovered by the complainant's solicitors that the decree was not in fact entered until the 24th of July. A new appeal bond was thereupon executed and filed, and a new notice of the appeal served on the defendant's solicitor, on the first of August thereafter; for the purpose of preventing any question as to the regularity of the appeal. The complainant subsequently redeemed the subject matter of the suit from the conditional assignment.

*M. T. Reynolds & W. J. Hough*, for appellants.

*A. Taber*, for the respondents.

THE CHANCELLOR. The objection to the regularity of the appeal as made on the first of August, 1844, would have been well taken if the assignment of the complainant's judgment and of his interest in the suit had been absolute, so that he had no longer any interest in the subject matter of the appeal. But the right reserved to him, in the assignment, to redeem, the amount of the judgment being several hundred dollars more than the amount of the costs of the assignees, left him a substantial interest in the suit, which authorized him to appeal in his own name. Nor could the defendants, who entered the decree against him subsequent to this conditional assignment object to the form in which the appeal was entered on the first of August.

If the appeal of the 18th of July was not a nullity on the ground that the decree had not then been actually entered in the records of the court, there could have been no doubt as to the regularity thereof in other respects; even if the assignment to the solicitors had been absolute and unconditional. For that appeal was previous to the assignment, as appears on the face of the assignment itself. Whether it would have been necessary

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Corning v. Gillman.

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to revive the proceedings on the appeal, in that case, before proceeding to the argument, is a question which cannot now arise. For it appears that the appellant has redeemed from the assignment, so that the whole beneficial interest in the litigation is again in him. And where the complainant, or appellant, assigns his interest *pendente lite*, either absolutely or conditionally, and obtains a reassignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the court by a bill in the nature of a bill of revivor. But in such a case the assignor who has subsequently been restored to his former rights may proceed in the same manner as if no such assignment had been made.

The motion to dismiss the appeal must be denied with costs.

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CORNING and others vs. GILLMAN.

Papers served by mail, under the 14th rule of the court of chancery, must be served by putting them into the post office at the place where the solicitor making the service resides.

THIS was an application to set aside an order taking the bill as confessed.

*M. B. Champlin*, for defendant, read an affidavit showing that within twenty days after the return day of the subpoena, the defendant's solicitor served upon the complainants' solicitor notice of his appearance, by putting the same into the post office at Rushville, Allegany county, properly enclosed in a wrapper, directed to the complainants' solicitor, at Albany, and paying the postage thereon. It appeared from the papers that the defendant's solicitor did not reside at Rushville, but at Cuba, in the same county.

*W. D. White*, for complainants.

The CHANCELLOR decided that under the 14th rule of the court, papers served by mail must be served by putting them

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Sherwood v. Hooker.

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into the post office at the place where the solicitor making the service resides.

Motion ordered to stand over, with liberty to renew it.

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### SHERWOOD vs. HOOKER and others.

Where a decree allows a mortgagor to redeem, on paying the amount to be reported due to the mortgagee, within a specified time after the confirmation of the master's report, but omits to declare what shall be the effect of an omission to redeem, the construction and effect of such a decree is, that if the party fails to pay the money within the time specified, his right to redeem is barred.

THE decree of the chancellor in this case, as reported in 8th Paige's Reports, 633, having been reversed by the court for the correction of errors, that court made a decree permitting the complainant to redeem the premises on paying the amount which should be reported due to Hooker, by the master, within thirty days after the confirmation of the report; but the decree, as modified and entered, omitted to declare what should be the effect of the omission of the complainant to redeem. The complainant having neglected to pay the amount reported due by the master, within the thirty days, Hooker presented a petition praying for a further decree or order, correcting the omission.

*W. C. Noyes*, for petitioner, cited *Perine v. Dunn*, (4 John. Ch. Rep. 140;) *Clark v. Hall*, (7 Paige, 382;) *Palm. Pr. House of Lords*, 58.

*S. Sherwood*, complainant, in person.

THE CHANCELLOR made an order declaring the construction and effect of the decree of the court of errors to be that if the complainant did not pay the money, within the time specified, he should be barred from all claim and equity of redemption in the premises. And he extended the time for redemption for thirty days, and directed that if the complainant failed to redeem within that time he should be foreclosed.

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### ACCOUNT.

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### ADMINISTRATION.

#### 1. Who entitled to.

Under the provisions of the revised statutes which prescribe the order in which administration, in cases of intestacy, shall be granted to the relatives of the deceased, if they, or any of them, will accept the same, and which provide that letters of administration shall not be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to a non-resident alien, nor to a minor, nor to any one who shall be adjudged incompetent, by the surrogate, to execute the duties of such trust by reason of drunkenness, im-

providence, or want of understanding, nor to a married woman, the surrogate has no discretion to exclude a person, declared by the statute to be entitled to a preference, except for some of the causes specified in the statute. *Coope v. Lowerre*, 45

#### 2. What will exclude a person from.

No degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration, as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime. *ib*

The conviction intended by the statute is upon an indictment or other criminal proceeding. *ib*

The improvidence contemplated by the statute, as a ground of exclusion, is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value, by improvidence, in case administration thereof should be committed to the improvident person. *ib*

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matter of fact, and without due notice to the party rightfully entitled to administration. *Proctor v. Wanmaker*, 302

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- 1. A party who has parted with his right or interest in property, or in a chose in action, by an absolute sale and assignment to another person, cannot, by his subsequent admissions, affect the right of the purchaser. *Christie v. Bishop*, 105

- 2. And the fact that such admissions are made upon the oath of the former owner does not alter the principle; where such oath is ex parte, and without any opportunity for cross-examination of the person making the admissions. *ib*

### 2. *Of a defendant against a co-defendant.*

- 3. It is a general rule not to allow admissions, or statements, in the separate answer of one defendant, to be read in evidence, to sustain the complainant's case against a co-defendant; unless the defendants stand in such a relation to each other that the admissions of each, if not under oath, would be evidence against the other; as in the case of several defendants standing in the relation of copartners, or as having a joint interest in the subject matter of the litigation. *ib*

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See *DECREE*, 13.

- 2. *In foreclosure suit.*] 2. The affidavit of merits, in a mortgage case, under the 91st rule, need not be made by the defendant himself. It is sufficient if it be made by his solicitor. *Banks v. Walker*, 74

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- 3. Where an answer on oath is waived, and affidavits of disinterested witnesses in support of an injunction are annexed to, and filed and served with the bill, the affidavits in support of the answer, and upon which the defendant relies in his application to dissolve the injunction, must either be served upon the complainant's solicitor with the answer, or must be served on him the usual length of time before the making of the motion to dissolve the injunction. *Markham v. Markham*, 374

### 4. *Stating matter on belief.*

- 4. It is not sufficient in an opposing affidavit, where the adverse party has no opportunity to answer the same, to state a matter upon the belief of the deponent only. *Quincy v. Foot*, 497

### 5. *On motion for leave to examine a co-defendant.*

- 5. Upon an application for leave to examine a co-defendant as a witness, there must be an affidavit that the person proposed to be examined is not interested in the matters to which he is to be examined. An affidavit of the solicitor that he is advised and believes such person to be a competent witness, is not sufficient. *The Amer-*

*ican Life Ins. and Trust Company v. Sackett,* 585

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### AGREEMENT.

#### 1. *Validity.*

1. Where real estate was sold upon execution, and the purchaser at the sheriff's sale sold his bid to two other persons, who advanced the money therefor, upon an agreement between them and the wife of the judgment debtor that her children should have six years to refund the purchase money and interest, and to have a conveyance of the property; *Held* that this was a mere agreement with the mother to sell the property to her children, at any time within the six years, for the purchase money and interest; and that as there was no agreement on the part of the mother, or the children, to take the property and pay for it within that time, it was an agreement without any consideration to support it, and was therefore invalid. *Getman v. Getman,* 499

2. *Held also*, that it was an agreement which required to be in writing, within the statute of frauds, even if there had been a sufficient consideration to support it. *ib*

#### 2. *Rescinding.*

3. Where a party has been defrauded by another, in the purchase or sale of property, he may rescind the contract, so as to restore the parties to the same situation they were in when the contract was made; or he may affirm the contract, so far as it has been executed, and claim a compensation for the fraud. *Bradley v. Bosley,* 125
4. But it must be a very special case which will authorize the injured party to come into a court of equity to have a contract partially rescinded; and it must be one in which the court can see that no possible injustice will be done by such a course. *ib*

#### 3. *Between husband and wife.*

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### ALIMONY

1. In suits for divorce, the allowance for *ad interim* alimony, and for the expenses of defending the suit, is not confined to cases in which both parties admit the original marriage to have been legal. *North v. North,* 241
2. But where the wife files a bill, against her reputed husband, to annul the marriage, on the ground of impotence, or for any other cause which goes to the legality of the marriage originally, *it seems* the allegations in her bill will be taken to be true, as against herself; when she applies for an allowance for alimony, or for expenses. *ib*
3. Where the husband files a bill against his reputed wife, admitting that he was in fact married to the defendant, but alleging such marriage to have been illegal, or void, if the facts stated in the bill, on which the supposed illegality, or invalidity, of the marriage depends, are denied by the defendant, on oath, she is entitled to *ad interim* alimony, and to an allowance for the expenses of the suit. *ib*
4. The allowance for *ad interim* alimony does not depend wholly upon the statute, but upon the practice of the court as it existed before the statute. *ib*
5. Where a husband files a bill against his wife, to annul the marriage, upon the ground that she had another husband living at the time of her marriage with him, which fact is denied by the defendant, in her answer, she is entitled to *ad interim* alimony, and to an allowance from the complainant to enable her to defend the suit. *ib*

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### APPEAL.

#### I. *WHEN IT WILL NOT LIE.*

1. An appeal will not lie for the granting or refusing of interlocutory costs which

are in the discretion of the court. *Utica Cotton Manuf. Co. v. Supervisors of Oneida*, 432

2. A decree or order entered by consent of both parties, before a vice chancellor, cannot be appealed from; although both parties consent that either may appeal. *Jarvis v. Palmer*, 379

## II. OF THE APPEAL BOND.

1. *It may be good to sustain appeal, though insufficient to stay proceedings.*
3. An appeal bond may be good for the purpose of sustaining the appeal, although it is wholly insufficient to stay the proceedings upon the decree or order appealed from. *Coithe v. Crane*, 21
2. *Amount of penalty, and form of condition.*
4. To render an appeal valid, it is sufficient if the appeal bond is in a penalty of not less than \$250, with two sufficient sureties who have justified in at least double that sum, and conditioned to prosecute the appeal, and to pay such costs and damages as may be awarded against the appellant. *ib*
5. Where a decree directs the payment of costs, but does not fix the amount of such costs, and the costs have not been taxed at the time of the appeal, the officer who approves the appeal bond should fix the penalty thereof in a sum at least double the probable amount of the debt and costs decreed to be paid; and should take security accordingly. *ib*
- 6 The 80th section of the title of the revised statutes, relative to writs of error and appeals, which declares that an appeal shall not be effectual for any purpose, until a bond to the adverse party in the penalty of \$250, or a deposit of money, as security for the costs upon the appeal, shall be given or made, is broad enough, *it seems*, to cover any appeal from an order or decree of the court of chancery, whether such order or decree was made by the chancellor or by a vice chancellor; unless the case is otherwise provided for in the title of the statute relative to the court of chancery, which authorizes the chancellor to regulate such appeals by general rules. *Thompson v. Ellsworth*, 624
- 7 That section of the statute is not inconsistent with the provisions of the 60th section of the title relative to the court of chancery; but may be considered as a superadded requisite, to render the appeal valid and effectual. *ib*
3. *Certificate of approval.*
8. Where the affidavits of justification, by the sureties in an appeal bond, are endorsed upon, and filed with, the bond and the certificate of approval by the proper officer, and show that each of the sureties is worth the requisite sum, and has all the other qualifications to become such surety, it is not necessary that the certificate of approval should itself state all those facts. *Coithe v. Crane*, 21
4. *Course of respondent when bond is insufficient to stay proceedings.*
9. Where the respondent considers the appeal bond as not sufficient to stay his proceedings upon the order or decree appealed from, he may proceed as though there was no appeal, leaving the appellants to apply, to the court below, to stay his proceedings or to set them aside as irregular; or he may himself apply to the court below for leave to proceed notwithstanding the appeal, upon the ground that the appellants have not given the requisite security to make the appeal a stay of the proceedings. *ib*
5. *To whom to be given.*
10. The adverse party, within the intent and meaning of the 80th section of the statute, and of the 116th rule of the court of chancery, means the party whose interest, in relation to the subject of the appeal, is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal. And where two or more persons have a common interest in resisting the reversal of the decree, or the modification which is sought for by the appellant, a joint bond to all of those respondents is a sufficient compliance with the statute and the rule of the court relative to appeals. It is not necessary, in such a case, for the appellant and his sureties to execute separate appeal bonds to each of the respondents. *Thompson v. Ellsworth*, 624
11. But where there are several respondents having entirely distinct and conflicting interests in relation to the object sought for by the appeal, separate appeal bonds should be given, to make



the appeal valid and effectual in reference to such adverse parties respectively *ib*

### III. HEARING.

12. Copies of the points made by each party, upon the hearing before the vice chancellor, should be furnished to the chancellor upon the appeal. *Beatty v. McNaughton*, 319

### IV. DISMISSING, AND REINSTATING.

1. *Effect of dismissing by consent.*
13. Where an appeal has been dismissed by consent of the appellant, an order of the court reinstating such appeal, will not be made for the exclusive benefit of parties who did not join in the appeal. *Boyd v. Vanderkemp*, 273
14. An appellant whose appeal has been dismissed by the consent of his counsel, has no right to have it reinstated, after the costs of such dismissal have been paid; especially after his discharge under the bankrupt act has left him without interest in the subject matter of such appeal. *ib*

### APPOINTMENT.

See HUSBAND AND WIFE, 5, 6, 7.

### ARBITRATION AND AWARD.

1. *Neglect of arbitrators to be sworn.*
1. The fact that arbitrators were not sworn, merely constitutes a technical defence, if it is any defence, to a bill filed to enforce the performance of their award; and the court of chancery will not open a regular order to close the proofs, and a decree founded thereon, for the purpose of allowing the defendant to prove such a defence. *Winship v. Jewett*, 173
2. *It seems* that an omission to have arbitrators sworn does not render their award invalid, where no objection is made previous to the making of such award. *ib*
2. *Effect of an erroneous decision.*
3. The fact that arbitators have made an erroneous decision does not render their award invalid. But the award, if made in good faith, is conclusive

upon the parties; and neither party will be permitted to prove that the arbitrators decided wrong, either as to the law or the facts of the case. *ib*

2. *Effect of a dissent by one of the arbitrators.*
4. It is no defence to a bill to enforce the performance of an award, that after the award had been concurred in by all the arbitrators, and published, one of them dissented therefrom. *ib*

### ASSIGNMENT

Where a complainant, or appellant, in a suit in the court of chancery, assigns his interest in the subject matter of the suit, *pendente lite*, either absolutely or conditionally, and obtains a re-assignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the court by a bill in the nature of a bill of revivor. But in such a case the assignor, who has subsequently been restored to his former rights, may proceed in the same manner as if no such assignment had been made. *Scouten v. Bender*, 647

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### ASSIGNOR AND ASSIGNEE.

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CREDITOR'S BILL, 14.  
PARTIES, 7.

### ATTACHMENT.

*On third answer being reported insufficient.*

1. Where the defendant's third answer was reported insufficient, and his exception to the master's report was overruled with costs, the defendant was directed to pay those costs within twenty days, or, in default thereof that the bill should be taken as confessed. The court also ordered an attachment to issue against him, as authorized by the 64th rule, for his contempt in not fully answering; and decided that, upon the return of the attachment, the complainant would be entitled to an order that the defendant be examined upon interrogatories, and that he be

committed until he has answered such interrogatories, and paid the costs.  
*Higbie v. Brown*, 321

2. In such a case the complainant is not entitled to an order to commit the defendant, and that he answer interrogatories, immediately upon the filing of the report of the insufficiency of the third answer. But he must wait until the time for excepting to the master's report has expired; or until the decision of the court thereon, if the report is excepted to. And he must then proceed by attachment, to bring the defendant into court, to answer for the contempt; before he can obtain the order for commitment of the defendant until he pays the costs and answers the interrogatories before the master. *ib*

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ORDERS, 6

## ATTORNEY GENERAL.

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## B

### BANKRUPT, AND BANKRUPT LAW.

- 1 *Validity of discharge, how contested in chancery.*
- 1 A suit upon a creditor's bill cannot be further proceeded in against a defendant, after he has obtained a regular discharge as a bankrupt; unless the complainant intends to contest the validity of such discharge, for the purpose of obtaining a personal decree against the bankrupt. And where the complainant wishes to contest the validity of the discharge, his proper course is to file a supplemental bill; stating the commencement of the original suit, the subsequent decree in bankruptcy, the discharge of the bankrupt, and the facts upon which the discharge is claimed to be void and inoperative; and making the assignee in bankruptcy, as well as the bankrupt himself, a party to such bill. *Penniman v. Norton*, 246
2. But if the complainant merely wishes to proceed against the property, which has passed to the assignee in bankruptcy subject to his prior claim there-

on, he must revive the suit against the assignee alone; stating the discharge of the bankrupt as a ground for proceeding no further in the suit against him, as a party. *ib*

3. The appropriate remedy of a complainant, in the court of chancery, where he wishes to contest the validity of a defendant's discharge under the bankrupt act, and to obtain satisfaction of the decree out of the defendant's subsequently acquired property, is to file a supplemental bill; stating the obtaining of the decree, the alleged or pretended discharge of the defendant, and the fraud which renders it invalid; and praying that the decree may be carried into full effect against the defendant, and his property, notwithstanding his alleged discharge. *Alcott v. Avery*, 347

4. And if the complainant wishes to protect and preserve his lien upon the defendant's subsequently acquired real estate, as against those who may become bona fide purchasers thereof without notice of the alleged invalidity of the defendant's discharge, he should file a notice, in the county clerk's office, of the pendency of such supplemental suit. *ib*

2. *Purchaser from assignee when to be a party.*

5. Where the assignee in bankruptcy has sold all his interest in the subject matter of the litigation, before the commencement of the proceedings to revive and continue the suit, that fact should be shown; and the purchaser should, in that case, be made a party to the suit, instead of the assignee in bankruptcy. *ib*

#### 3. *What debts are provable.*

6. Where a decree is made, directing the defendants to pay the damages which the complainant has sustained by reason of the non-performance of an agreement by them, and directing a reference to a master to ascertain and report the amount of such damages, such damages constitute a present debt, payable when the amount thereof shall be liquidated by the master. And, under the bankrupt law of 1841, such debt is provable, against the estate of one of the defendants who has been declared a bankrupt. *Boyd v. Vanderkemp*, 274

- 4 *Discharge, when, and how, to be set up.*
- \* Where a suit is commenced against a bankrupt, subsequently to his discharge, it is his duty to set up the discharge, as a defence; so as to give the adverse party an opportunity to impeach it, for fraud, if he wishes to do so. *Alcott v. Avery*, 347
8. A bankrupt must also set up the discharge, in a suit pending against him at the time it is obtained, as a bar to the further continuance of such suit, to obtain satisfaction of the debt from him personally, or out of his future acquisitions; provided the situation of the suit, at the time of obtaining such discharge, is such as to enable him to set up his discharge as a defence. *ib*
3. *When court will grant relief.*] In cases of that kind the court will not relieve the bankrupt, where he has lost the benefit of his discharge by his own negligence. *ib*
10. But where a judgment or decree, obtained subsequently to the discharge, will be binding on the defendant, or his after acquired property, and where he has had no opportunity to set up such discharge, the court will grant him relief, upon a summary application. *ib*
11. In such a case, if the validity of the discharge is disputed, the relief granted is to put the parties in the way of trying the validity of the discharge; but without interfering, in the meantime, with the rights which the creditor has acquired by his judgment or decree. *ib*
5. *Constitutionality of act of 1841.*
12. The voluntary provisions of the bankrupt act of the United States, passed in 1841, are not unconstitutional. *Morse v. Hovey*, 404
13. A discharge of a bankrupt, in conformity to such provisions, is valid as respects pre-existing debts, as well as debts contracted by the bankrupt subsequent to the passage of that act. *ib*
6. *Petition for leave to issue execution.*
- 14 *It seems that in a proper case, the court may allow the complainant to proceed by petition; for leave to take out an execution, upon his decree, notwithstanding the discharge of the defendant under the bankrupt act. But*

the defendant must be served with a copy of such petition, and with notice of the time and place of presenting the same. *Alcott v. Avery*, 347

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## BILL OF DISCOVERY.

1. The complainant, in a bill of discovery in aid of a defence in a suit at law, must state a case which will constitute a good defence to such suit. *Williams v. Harden*, 298
2. The defendant, in a suit at law, is not entitled to come into the court of chancery, for the discovery of a mere isolated fact; which fact may, or may not, be material to his defence. But in order to sustain a bill of discovery, the complainant therein must show what his defence to the suit at law is; so that the court can see that the fact of which a discovery is sought, if admitted to be as stated in the bill, may be material in the establishment of such defence. *ib*

## BILL OF REVIEW.

A bill of review must be brought within the time allowed by law for appealing from the decree. *Boyd v. Vanderkemp*, 273

## BILL OF REVIVOR.

1. Where a bill for partition is filed, and the complainant subsequently dies, and his devisee thereupon files a bill to revive and continue the proceedings in the original suit, it is no objection to this last bill that the complainant is an infant, and was therefore incapable of commencing an original suit for the partition of lands. *McCosker v. Brady*, 329
2. Such a bill, filed by a devisee, although it is so far an original bill that the validity of the devise may be contested thereon, is in reality a bill to revive and continue the proceedings in the original suit. *ib*
3. Under the 23d rule of the court of chancery, if the defendant in such a suit, does not deny the validity of the devise, upon which the right of the new complainant, to revive and continue the original suit, and to have the

benefit of the proceedings therein, rests, such suit may be revived upon motion; without waiting to bring the new suit to a hearing upon such new matter. *ib*

4. Where the right of the devisee, to revive and continue the proceedings in the original suit, as the proper representative of the former complainant in such suit, is admitted, or has been established by a decree founded upon the new matter, the new complainant is entitled to the same benefit of those proceedings, so far as his interest as devisee is concerned, as if he had been in a situation to continue those proceedings by a simple bill of revivor. *ib*

### BOND

See APPEAL, 3 to 7.

HUSBAND & WIFE, 14 to 16.

IDIOTS &c. 8.

INJUNCTION, 5 to 8, 10 to 13.

### BRIDGES.

1. Where an act of the legislature, incorporating a bridge company, left it to the discretion of the commissioners, appointed by such act, either to purchase and repair an existing bridge, or to erect a new one at some other point on the river; *Held*, that the court of chancery had no power to control the exercise of that discretion; in the absence of proof that it had been exercised corruptly, or dishonestly, by the commissioners. *The Oswego Falls Bridge Co. v. Fish*, 547
2. The grant to a corporation of the right to erect a toll bridge across a river, without any restriction as to the right of the legislature to grant a similar privilege to others, does not deprive a future legislature of the power to authorize the erection of a free bridge across the same river, so near to the first as to divert a part of the travel which would have crossed the river on the first bridge if the last had not been erected. *ib*

### C

#### CASES OVERRULED, COMMENTED ON, AND EXPLAINED.

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### CERTIFICATE.

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### COMMITTEE.

See IDIOTS &c. 8.

### COMPLAINANT

See EXAMINATION, 1.

### CONSIDERATION.

See CONVEYANCE, 1, 2, 3.

### CONSTITUTIONAL LAW.

1. There is nothing in the constitution of the United States to deprive the courts of one of the states, of the jurisdiction which they previously possessed, as to suits against a state, brought by citizens of another state, or by citizens or subjects of a foreign state. *Garr v. Bright*, 157
2. The courts of the United States have not even a concurrent jurisdiction with the state courts of chancery, in suits brought by individuals against a state *ib*

### CONTEMPT.

Practice upon proceedings for contempts against defendants for not attending before the master and submitting to an examination, &c. upon a reference to appoint a receiver in a creditor's suit. *Hammersley v. Parker*, 25

See ATTACHMENT.

EXAMINATION, 3.

### CONVEYANCE.

1. *Consideration; validity.*
1. The law sanctions a conveyance founded upon the consideration of

blood or marriage merely. And the legal presumption is, that such a conveyance is valid, and not a fraud upon the rights of any one. *Frazer v. Western*, 220

2. The mere fact that a purchaser, from the holder of such a conveyance, has notice that it was not founded upon a pecuniary consideration, is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent. *ib*

3. He has a right to act upon the legal presumption that such a deed of gift, or voluntary settlement, was honestly made; unless some other fact is brought to his knowledge, to raise a suspicion in his mind that the conveyance was intended to defraud some one. *ib*

#### 2. Construction and effect.

1. In April, 1829, W., the owner of a state certificate, which entitled him to a patent for a village lot in East Oswego, upon the payment of \$30, which remained due to the state for the purchase money, sold and conveyed the north half of the lot to A. C., with warranty; and the conveyance was recorded on the 15th of August, in the same year; and the grantee in that conveyance conveyed that half of the lot to P., who subsequently conveyed it to the complainant; and the day before the recording of the conveyance to A. C., the holder of the state certificate assigned it to G. and C., together with a contract which he had made with D. for the sale of the southwest quarter of the lot. And they gave back to him a covenant, that whenever they should obtain the patent from the state, they would convey the southwest quarter of the lot to D., with warranty, and would convey the residue of the lot to W., by a quit-claim deed; and subsequent to the recording of the conveyance to A. C., for the north half of the lot, W., by an endorsement on the covenant of G. and C., sold to the defendant all his right, title, and claim to the land mentioned in that covenant, for a valuable consideration; G. afterwards assigned his interest in the state certificate to C., who obtained a patent for the whole lot in his own name; and subsequently conveyed to the defendant all the lot, except the southwest quarter which was contracted to be sold to D.; under which last mentioned conveyance the defendant subsequently claimed title to the north half of the lot,

as well as to the southeast quarter thereof to which he was entitled as the assignee of the covenant of G. and C. Upon a bill filed by the complainant, to compel the defendant to execute a quit-claim deed to him of the north half of the lot; *Held*, that by the conveyance by W. of the north half of the lot, to A. C., the \$30, due to the state for the unpaid purchase money, became primarily chargeable upon the south half of the lot; and that the contract with D. entitled him to the southwest quarter, subject to the payment of the purchase money due upon that contract; that as between D. and W., as well as between the latter and A. C., the \$30 due to the state was a charge upon the purchase money due from D. on his contract with W. *Turner v. Peck*, 549

5. *Held further*, that by the assignment of the state certificate from W. to G. and C., they took no beneficial interest in the north half of the lot, nor in the southeast quarter thereof. But that the legal effect of the assignment of the state certificate, and of the covenant from G. and C. to W., to quit-claim the other three quarters of the lot to him, was that, upon obtaining the patent from the state, they were bound to convey three fourths of the lot to him absolutely and unconditionally. And as to the southwest quarter, they were to convey it to D. upon his complying with the terms of his contract; and to receive and retain the purchase money due upon that contract to reimburse them for the \$30 which they were to pay to the state. And that if D. did not comply with his contract they would be entitled to that quarter of the lot for their own use and benefit. *ib*

6. *Held also*, that the only equitable right which W. had in the lot, under the covenant of G. and C., at the time of this assignment to the complainant, was the right to an absolute conveyance, for his own benefit, of the southeast quarter of the lot, as soon as a patent should be obtained from the state. And that the defendant took the assignment of W.'s right to a quit-claim deed, under that covenant, subject to the previous right of A. C. to the north half of the lot under the previous conveyance by W. with warranty. *ib*

7. *Held further*, that C., the patentee of the state, took the legal title to the

north half of the lot, by virtue of the patent, in trust for the complainant's use and benefit; such being the effect of the covenant of G. and C. in connection with the conveyance with warranty to A. C. under and through which the complainant had obtained his equitable right to that half of the lot. And that the conveyance of that part of the lot to the defendant being without consideration, the latter was not entitled to hold it as against the complainant's equitable right. *ib*

## CORPORATION.

### I. WHEN NOT BOUND BY DECREE.

1. A mortgage was executed in the name of a corporation, and under its corporate seal, by persons claiming to be the trustees thereof; and a bond collateral to such mortgage was at the same time executed by such persons. Subsequently a suit was commenced against the persons executing the mortgage, by certain other persons who claimed to be the rightful trustees of the corporation, to enforce their rights as such trustees. Pending that suit the mortgagee filed a bill to foreclose his mortgage, against the corporation by its corporate name, and against the obligors in the bond. And he obtained the usual decree of foreclosure, and a decree over against the obligors in the bond, for the deficiency, if any. The persons who brought the suit first mentioned were afterwards, by a decree in that suit, declared to be the rightful trustees of the corporation, and the persons who executed the mortgage as trustees were decided to have usurped the powers of the corporation. Those who were declared to be the lawful trustees not having been made parties to the bill of foreclosure, nor served with the process of subpoena against the corporation; *Held*, that the decree in the foreclosure suit was irregular as against the rightful trustees of the corporation, and was not binding upon such corporation. The decree, and all proceedings subsequent to the filing of the bill of foreclosure, were therefore set aside, and the bill was dismissed; but without prejudice to the right of the complainant to proceed in a new suit, at law or in equity, to recover the debt alleged to be due upon his bond and mortgage. *Brindernagle v. German Ref. Church*, 15

### II. TAXATION OF ITS PROPERTY.

1. *What portion taxable.*
2. The estate of a corporation which is taxable as personal property, is only that portion of its capital which is not invested in real estate. But the capital of a corporation embraces the whole of its stock paid in, or secured to be paid whether it is invested in real or personal property. *The Utica Cotton Manuf. Co. v. Supervisors of Oneida*, 432
2. *Method of exempting property.*
3. Under the 9th section of the fourth title of the article of the revised statutes relative to the assessment of taxes on incorporated companies, &c. the real as well as the personal estate of a corporation, is exempted from taxation; provided a satisfactory affidavit is presented to the board of supervisors of the county in which such property is assessed, showing that such company is not in the receipt of any income or profits, either from its real or personal estate. *ib*
4. If such an affidavit is made, and filed with the clerk of the board of supervisors, within the time prescribed by the statute, it is the duty of such board to strike the name of the corporation out of the assessment roll. *ib*
5. But the board of supervisors should require the affidavit to be in such a form as to leave no doubt upon their minds that the real as well as the personal estate of the corporation is wholly unproductive; so that it yields neither rents nor income which are received by the corporation or its agents. *ib*
3. *Principle of taxing.*
6. The principle of the revised statutes in regard to the taxation of corporations is, to tax the real estate of each corporation, except as to canal, turnpike, and bridge companies, upon its *actual* value, for the benefit of the inhabitants of the town and county where it is situated, in the same manner as the property of individuals is taxed. And to tax the residue of its capital, after deducting the *cost* of its real estate, as personal property; for the benefit of the inhabitants of the town and county where the financial concerns of the corporation are carried on. *ib*

**III. INSOLVENT CORPORATIONS.**

7. It is the duty of the receiver of an insolvent corporation, to call upon the stockholders to pay the balances due upon the shares of stock held by them respectively, where he has reason to believe the whole amount due from those who are solvent will be wanted for the payment of the creditors of the corporation, and the expenses of executing the trust. *Pentz v. Hawley*, 122
8. And the mere fact that the whole amount due from any particular Stockholder, for his stock, may not ultimately be wanted for that purpose if all the other solvent stockholders should pay their rateable proportions, according to the amount of their stock, will not authorize the particular stockholder to enjoin the receiver from proceeding to enforce the payment of the balance due from such stockholder, in the first instance. *ib*
9. If any balance remains, in the hands of the receiver of an insolvent corporation, after satisfying the debts of the corporation, and the necessary expenses of executing the trust, it must be distributed among the several stockholders who have paid in full for their stock. *ib*

**COSTS.**

**I. WHEN GRANTED, AND WHEN REFUSED.**

**1. General rule.**

1. Although costs, in equity, are in the discretion of the court, except in the case of a complainant's dismissing his own bill, or suffering it to be dismissed for want of prosecution, as a general rule the party succeeding upon the merits is entitled to costs. *Garr v. Bright*, 157
2. *In suits by executors.*
2. The provisions of the revised statutes in relation to costs, at law, in actions brought by executors and administrators, do not apply to suits in the court of chancery. *ib*
3. The principle, that costs in equity are in the discretion of the court, applies to suits brought by executors or administrators, in the court of chancery, as well as to suits brought by other persons. And it seems, the rule is the

same at law; in cases where the costs are not regulated by statute. *ib*

4. Where a bill is filed by an executor or administrator, which bill, upon its face, is not sustainable, that is, where the matter in dispute does not depend upon a question of fact but of law, and where such suit is brought against a stranger to the estate of the decedent, and not for the mere purpose of obtaining the direction of the court as to the manner in which the complainant shall execute his trust, or to settle the conflicting claims of the several persons interested in the estate, the general rules of the court relative to costs in suits brought by other persons will be applied. *ib*
5. An executor is liable for the costs, upon a bill of discovery filed by him in aid of a defence at law, where it appears, by the defendant's answer, that there is no fact within the knowledge of the latter which is material to the complainant's defence. *Williams v. Harden*, 298
3. *On dissolving injunction upon bill and answer.*
6. Costs will not, in general, be given to a defendant upon the dissolution of an injunction, on bill and answer, where the bill was sufficient, upon its face, to entitle the complainant to the injunction. *Otis v. Forman*, 31
4. *In suits against committees of lunatics.*
7. Where the committee of a lunatic is sued by bill, when the right of the adverse party might have been settled upon a summary application to the court, it may be a good reason for refusing costs to the complainant, although he succeeds in the suit. *Outtriv v. Graves*, 49
5. *On dismissing bill, upon demurrer.*
8. In general, where the bill is dismissed upon a general demurrer thereto, for want of equity, the defendant is entitled to costs. *Garr v. Bright*, 157
6. *Of exceptions to answer.*
9. Where a second or third answer is referred for insufficiency, upon the matters of several exceptions, if such answer is eventually decided to be sufficient in the matter of either of the exceptions as to which it is referred

the complainant is not entitled to the costs of the reference. *Higbie v. Brown*, 321

7. *On overruling demurrer to bill.*

10. It is a matter of course to give costs to a complainant, upon overruling a demurrer to his bill; unless there is something very special in the case, to take it out of the general rule. *The Utica Cotton Manuf. Co. v. Supervisors of Oneida*, 432

8. *In suits for divorce.*

11. In a suit for a divorce, on the ground of adultery, if the wife obtains a decree for costs against her husband, she is not entitled to collect the whole amount of her taxable costs, if a sum has already been advanced to her, or to her solicitor, or next friend, on account of such costs, *pendente lite*. *Kendall v. Kendall*, 610

12. But the allowance to her for costs and expenses of the suit is not confined to the mere taxable costs as between party and party. In litigated cases, where the wife is necessarily subjected to extra expenses and counsel fees, in addition to the taxable costs as between party and party, the whole amount which has been advanced to her, *pendente lite*, for costs and expenses, should not be deducted from the ordinary bill of costs as between party and party, to which she is entitled under the decree. And the husband should be allowed only for the balance of his advances, after deducting therefrom the necessary expenditures of the wife for counsel fees, &c., which are not included in the ordinary taxed bill *ib*

13. In ordinary cases, where the husband is the defendant in a suit for a divorce, and admits the allegations in the bill, either by his answer or by allowing the bill to be taken as confessed against him, the ordinary taxable costs are sufficient to cover all the reasonable expenses of the suit, except the extra expense which may be necessary to procure the attendance of witnesses before the master, in addition to the allowance made by law to the witnesses. And that is all that should be allowed in such cases; unless it is made to appear that something special had occurred in the progress of the suit to render the employment of counsel, other than the solicitor in the cause, necessary. *ib*

9. *To prior incumbency.*

14. Where a prior incumbrancer is obliged to appear in a foreclosure suit, in order to protect his rights, he is entitled to the necessary costs of his appearance; to be first paid out of the proceeds of the sale under the decree. *Mayer v. Salisbury*, 546

II. PRINCIPLES OF TAXATION.

15. It was not the intention of the legislature, by the amendatory act to reduce the expense of foreclosing mortgages in the court of chancery, to give to the complainant's solicitor, for the mere institution of a foreclosure suit which is settled previous to a decree, the full allowance for costs prescribed by that act for the whole of the proceedings, in a foreclosure suit, where there is no defence. *Shaw v. McNish*, 326

16. The only effect which can be given to that act, in suits which are settled, or discontinued, before they have proceeded so far as to show whether a defence will be made by any of the defendants, is to limit the solicitor's fees; so that they shall not exceed the gross amount fixed, by the statute, for the whole proceedings when there is no defence. *ib*

17. As the acts of 1840 and 1841 have made no provision for compensation in such cases, the solicitor is entitled to have his costs taxed according to the general fee bill in other suits; subject to this limitation as to the gross amount. *ib*

18. The act of 1840, to reduce the expense of foreclosing mortgages in the court of chancery, applies only to cases in which the complainant can bring his cause to a hearing, and obtain his decree, without the necessity of filing a replication to the defendant's answer. *Frost v. Frost*, 492

19. Where an adult defendant puts in an answer, setting up new matters of defence, or putting in issue any material allegations in the bill, so as to render it necessary for the complainant to establish such allegations by proof, at the hearing, the provisions of the act of May, 1840, as to the amount of costs in foreclosure suits do not apply. *ib*

20. And the complainant is entitled to full costs in such a case, although he



is enabled to bring his cause to hearing upon bill and answer, and to prove the matters put in issue by the answer, at the hearing, by the production of documentary evidence; under the second clause of the 17th rule of the court of chancery. *ib*

21. Where a bill of foreclosure was filed against several defendants, one of whom put in an answer which rendered it necessary to file a replication; in consequence of which that defendant, by the final decree in the suit, was charged with the extra costs, thus occasioned, beyond the amount allowed by statute in foreclosure cases where no defence is made; *Held* that the proper course was to ascertain the whole taxable costs of the complainant, in the same manner as if the defendant against whom the extra costs were charged had been decreed to pay the full costs of the suit, and then to ascertain the amount of costs which would have been taxable, under the statute, if such defendant had suffered the bill to be taken as confessed for want of an answer. The last amount should then be taxed as the general costs of the cause, to be paid out of the proceeds of the mortgaged premises; and the residue of the full bill of costs, after deducting therefrom the last mentioned amount, should be taxed as the extra costs occasioned by the putting in of the answer of the defendant who was personally charged with such extra costs. *ib*

22. *Held also*, that in the full bill of costs the fees of the register, or clerk, for all his services, should be charged at the rate fixed by the general fee bill. But in the general costs to be paid out of the proceeds of the sale, only the charges for the services of the register or clerk which are allowed under the act of May, 1840, and at the rate therein prescribed, should be included. And that in the full bill, all the necessary disbursements in the suit should be charged, but in the other bill only such disbursements as would have been requisite if the answer had not been put in. *ib*

### III. WHAT CHARGES ARE TAXABLE.

#### 1. Costs of motions.

23. Where a defendant obtains a general decree for costs, at the final hearing, he is entitled to his costs of a successful motion, previously made, to dissolve

the injunction, to be taxed as costs in the cause; although nothing was said by the court in reference to costs, upon the decision of that application. *Otis v. Forman*, 30

24. The 199th rule, which provides for the amount of costs where the court directs a motion or petition to be granted or denied with costs, does not apply to such a case. For where the costs of a special motion are allowed as a part of the general costs in the cause, the several items of such costs are to be taxed as a part of the general bill; unless the court directs the contrary. *ib*

#### 2. For engrossing copy affidavits.

25. A charge for engrossing a copy of affidavits used on a special motion, to keep, is not allowable on taxation. *Otis v. Forman*, 30

3. *Solicitor's and counsel fee, on motion to postpone hearing.*

26. A party is not entitled to charge a separate solicitor's and counsel fee upon an unsuccessful attempt of the opposite party to postpone the hearing of a motion to dissolve an injunction. *ib*

#### 4. Filing draft order.

27. A charge for filing the draft of an order is not taxable. *ib*

#### 5. Solicitor's and counsel fee at the hearing.

28. Where a cause is brought to hearing upon pleadings and proofs, the counsel who actually attend are entitled to their fees; although the adverse party does not appear, to argue the cause on his part, but suffers the decree to be taken against him by default. *ib*

29. The solicitor is entitled to his fee if he actually attends when the cause is reached and heard. *ib*

30. Where the solicitor in the cause actually attends the court, upon the hearing of a cause, he is entitled to the allowance specified in the fee bill; although he is not actually present, in the court room, at the moment the decree is obtained or the cause is argued. *Frost v. Frost*, 493

#### 6. Serving copy decree, and proof of service.

31. Charges for serving copy of decree, and for proof of service, are not taxa-

ble, unless it is a decree that the party is required to serve. *Otis v. Forman*, 30

7. *Engrossing enrolment of decree.*

32. Engrossing the enrolment of decree is properly chargeable; and five folios, in addition to the decree itself, are allowed for the enrolment. *ib*

8. *Amendment of decree.*

33. Where an amendment of a decree becomes necessary in consequence of an error of the solicitor of the successful party in drawing it up, the costs of such amendment are not taxable against the adverse party. *ib*

9. *Solicitor for attendance on examination of witnesses.*

34. A solicitor is only entitled to an allowance, for attendance upon the examination of witnesses, for the number of days he actually attends before the examiner. He cannot charge for his time in travelling to and from the residence of the examiner. Nor for his attendance over the sabbath, when testimony cannot legally be taken; although he is obliged to remain from home till after the sabbath, to continue the examination of his witnesses the next day. *Frost v. Frost*, 492

10. *Of term, when cause is put over, by consent.*

35. Where a cause is reached, upon the calendar, and goes over the term at the request and for the particular accommodation of the counsel of the party who finally succeeds in the cause, such party is not entitled to charge his adversary with the costs of noticing the cause, and for the other expenses of the term. But where the cause is not reached upon the calendar, or where it goes off for the mutual accommodation of both parties, those expenses are taxable. *ib*

11. *Unnecessary parties.*

36. Where the solicitor for the complainant, in a foreclosure suit, brings persons before the court, as defendants, whom he had no reason to suppose were necessary or proper parties, the taxing officer may inquire into the facts; and he should disallow all charges for extra costs, or for disbursements, on account of such unnecessary parties. *Shaw v. McNish*, 326

37. Nor will the taxing officer be precluded from doing this by the formal

charge, in the bill of complaint, that such defendants have, or claim, some interest in the mortgaged premises, as subsequent purchasers or incumbrancers. *ib*

IV. SECURITY FOR.

38. An application to the surrogate, by a creditor, legatee, or distributee, to compel the executor or administrator to pay the debt, legacy, or distributive share out of the fund in his hands, is not such a suit as will entitle the party proceeded against to security for costs, where the applicant is a non-resident. *Westervelt v. Gregg*, 469

39. The provisions of the revised statutes relative to security for costs, apply only to suits in courts of record, and are not applicable to proceedings before a surrogate. *ib*

V. COSTS IN SPECIAL CASES.

40. The order requiring a defendant in a creditor's suit to attend before a master and comply with the order of reference, and to pay the costs, or show cause why an attachment should not issue against him, should specify the amount of the costs which the defendant is to pay. *Hammersley v. Parker*, 25
41. Eight dollars is the sum usually inserted in such an order; unless the court, for special reasons, sees fit to direct a larger sum to be paid. *ib*

COURTS OF THE UNITED STATES.

See CONSTITUTIONAL LAW.

COVENANT.

See CONVEYANCE, 4 to 7.

CREDITOR'S BILL.

1. *Who may join in.*

- 1 Two or more judgment creditors, having separate judgments, may join in a bill to reach the equitable interests and choses in action of their common debtor, after they have exhausted their remedies at law, by execution, upon their respective judgments. *Murray v. Hay*, 59

2. *Within what time it may be filed.*
2. A creditor's bill may be filed at any time within ten years after the complainant has exhausted his remedy against the defendant's property, by the return of an execution unsatisfied, which has been issued to the proper county. *Corning v. Stebbins*, 589
3. There is no limitation, in the statute, of the right of a judgment creditor to apply to the court of chancery for relief in such cases; except the ten years which the statute has fixed as the time within which suits purely of equitable cognizance must be brought in the court of chancery. *ib*
3. *What may be reached by.*
4. A provision in a deed of trust, for the support of the grantor, for life, out of the income of the trust property, creates an interest in such income, which can be reached by judgment creditors of the grantor, by a creditor's bill in the court of chancery, upon the return of executions at law unsatisfied. *Bryan v. Knickerbacker*, 409
5. Where a *cestui que trust* has a beneficial interest in a fund, for his support and maintenance, under a valid trust created previous to the revised statutes, such interest will pass to his assignees in bankruptcy, or under the insolvent acts, or by his own voluntary assignment to a third person. Consequently it may be reached upon a creditor's bill; especially where the trust fund has proceeded from himself, and not from a third person. *ib*
6. After a creditor of a *cestui que trust* has exhausted his remedy at law, by execution against the property of his debtor, he may, by a creditor's bill, reach the surplus of such debtor's interest in the rents and profits or income of property which the *cestui que trust* cannot alienate and dispose of in anticipation; so as to satisfy the judgment out of that part of the income which is not necessary for the education and support of the *cestui que trust*, from time to time. *L'Amoureux v. Van Rensselaer*, 34
7. But as a feme covert cannot pledge or create a charge upon her interest in such a trust in anticipation of the income which may thereafter accrue, or become payable to her, and as she cannot contract a personal liability

upon which a judgment can be recovered, her interest, even in the surplus income which is not necessary for her support, cannot be reached, except for a debt contracted before marriage. *ib*

#### 4 Upon what judgments.

8. Judgments rendered by justices of the peace upon attachments which were not served on the defendant personally, and to which he did not appear, are not such judgments as will entitle the owner thereof to come into the court of chancery for relief; upon the return of the executions issued thereon, unsatisfied. *Corey v. Cornelius*, 571
9. The remedy of the owner of such judgments is to bring new suits thereon; so as to give the defendant an opportunity to rebut the prima facie evidence of indebtedness, or to offset any demand which he may have. And if the plaintiff succeeds in obtaining new and general judgments, in those suits, he must proceed and exhaust his remedy against the real as well as personal estate of the defendant, by execution, before he can file a creditor's bill, in the court of chancery. *ib*
5. *Amending, of course.*
10. Where, subsequent to the commencement of a creditor's suit against the defendant, the complainant's solicitor discovered that a creditor's bill had previously been filed by them upon one of the judgments set forth in said bill, and that the suit thus commenced was still pending; and the complainants amended the bill in the last suit, by leaving out all the statement therein relative to that judgment, and the issuing and return of the execution unsatisfied, leaving the amended bill to stand as an ordinary creditor's bill, founded upon the other judgment only, with the original jurat attached thereto; but the amendments were properly sworn to, for the purpose of verifying the bill as amended; *Held*, that the amendment was one which could be made of course, to a creditor's bill, under the provisions of the 190th rule. And that to authorize such an amendment of a creditor's bill, no rule or order for leave to amend is necessary; although an injunction has been issued. *Corning v. Stebbins*, 589
11. *Held also*, that it was not necessary to issue a new execution, and to have

it returned unsatisfied, before commencing the suit. *ib*

6. *When a new execution must be issued.*

12. After the expiration of ten years from the time of the return of an execution unsatisfied, the complainant must issue a new execution to the county where the defendant then resides, before he can file a creditor's bill, where his right, founded upon the return of the first execution, is barred by lapse of time, and the judgment still remains in force. *ib*

7. *Where execution must be filed.*

13. Where a judgment, recovered in the superior court of the city of New-York, or in a court of common pleas, is docketed in another county, a creditor's bill cannot be sustained upon the return of an execution to the clerk's office of the county in which the judgment is so docketed. To authorize the filing of a creditor's bill, the execution must have been duly returned and filed with the clerk of the court from which such execution issued. *Winslow v. Pitkin*, 402

8. *When grantee or assignee of judgment debtor should be made a party.*

14. Where property, alleged to be fraudulently assigned by the defendant, is not in his possession or under his control, so as to make it his duty to deliver it up to the receiver, and to leave the fraudulent assignee or grantee to come in and be heard *pro interesse suo*, the proper course for the complainant is to make the grantee or assignee a party to the suit; so as to have the receivership extended to him. *Green v. Hicks*, 309

15. If a person declared a bankrupt, against whom a creditor's bill had been previously filed, has an interest in any property, at the time the decree in bankruptcy is made, it passes to the assignee, subject to the complainant's claim thereon. And if such suit is to be further proceeded in, for the purpose of settling the complainant's right to satisfaction out of such property, the assignee in bankruptcy is a necessary party. *Penniman v. Norton*, 246

9. *Effect of bankruptcy of defendant.*

16. A suit upon a creditor's bill cannot be further proceeded in against a defendant, after he has obtained a regu-

lar discharge as a bankrupt; unless the complainant intends to contest the validity of such discharge, for the purpose of obtaining a persona decrees against the bankrupt. And where the complainant wishes to contest the validity of the discharge, his proper course is to file a supplemental bill, stating the commencement of the original suit, the subsequent decree in bankruptcy, the discharge of the bankrupt, and the facts upon which the discharge is claimed to be void and inoperative, and making the assignee in bankruptcy, as well as the bankrupt, a party to such bill. *Penniman v. Norton*, 246

17. But if the complainant merely wishes to proceed against the property, which has passed to the assignee in bankruptcy, subject to his prior claim thereon, he must revive the suit against the assignee alone; stating the discharge of the bankrupt as a ground for proceeding no further in the suit against him, as a party. *ib*

18. Where the assignee in bankruptcy has sold all his interest in the subject matter of the litigation, before the commencement of the proceedings to revive and continue the suit, that fact should be shown; and the purchaser should, in that case, be made a party to the suit, instead of the assignee in bankruptcy. *ib*

10. *Practice where defendant is let in to defend suit at law.*

19. Where a creditor's bill is filed in the court of chancery, upon the return of an execution at law unsatisfied, and the defendant is subsequently let in to defend in the action at law, the judgment being left to stand as a security to the adverse party, the proper course is to stay the proceedings, in the court of chancery, until the final decision of the court of law, upon the new trial, is ascertained. *Drew v. Dwyer*, 101

20. The injunction in the creditor's suit should be retained until that time also; unless the defendant chooses to give security to pay whatever sum may be recovered against him in the action at law, together with the costs in the creditor's suit. But if such injunction is dissolved by the court, upon motion, a new injunction, founded upon the second verdict, ought not to be granted, except upon new facts. *ib*

11. *Examination of defendant under order of reference to appoint a receiver.*

21. Under the usual order of reference to a master to appoint a receiver, in a creditor's suit, the complainant is not authorized to examine the defendant for the mere purpose of ascertaining whether he had not made a fraudulent assignment of his property, previous to the commencement of the suit; unless such property is still in the possession or under the control of the defendant. *Green v. Hicks*, 309

22. Whether the receiver himself has the power, under such an order, to examine the defendant, or any other person, as a witness to establish the fact of such a fraudulent sale or assignment? *Quære.* *ib*

23. Under such an order, the complainant is not authorized to examine the defendant, or any other person, as to matters not relating to the appointment of the receiver, or to the ascertainment of the possession, nature, situation, value, character or other particulars of the property which is to be assigned to the receiver, or to be delivered to such receiver by the defendant. *ib*

24. What questions the defendant is bound to answer, on his examination before a master, upon an order of reference to appoint a receiver, in a creditor's suit. *ib*

12. *Assignment by defendant, to receiver.*

25. What property the defendant may be directed, by the master, to assign and deliver over to the receiver. *ib*

26. The assignment to the receiver, executed by the defendant in a creditor's suit, need not contain a reservation of property which he holds merely in the character of trustee for others, upon a valid trust, and in which property he has no beneficial interest. Nor is it necessary that the assignment should except property which the defendant has already assigned to a receiver appointed in a previous suit. *Cagger v. Howard*, 368

27. But such an assignment should contain an exception of such property as is by law exempted from sale on execution; where it is made to appear to the master that the defendant is entitled to have any part of his property thus exempted; and this notwithstanding

ing the general language of the order of reference. *ib*

13. *Irregularities in courts of law.*

28. Irregularities in the proceedings in a court of law can only be objected to there. They cannot be taken into consideration in the court of chancery, in a creditor's suit brought upon the judgment at law. *Barnard v. Darling*, 218

14. *Parties.*

See PARTIES, 8, 9.  
RECEIVER, 6.

15. *When a supplemental bill necessary.*

29. After the return of an execution unsatisfied, the plaintiff filed a creditor's bill against the judgment debtor, and thereupon the defendant and a third person gave a note as collateral security for the payment of the debt and costs, but without discharging the judgment, or discontinuing the creditor's suit; the note not having been paid at maturity, a new judgment was recovered thereon against the judgment debtor and his surety; *Held* that it was improper to file an original creditor's bill, upon the last judgment, and to continue the proceedings in the first suit; but that the proper course was to file a supplemental bill. *Winslow v. Pitkin*, 402

## CURTESY.

See TENANCY BY THE CURTESY.

## D

## DAMAGES.

1. A bill in equity for the purpose of obtaining a compensation in damages merely, to be paid by the defendant personally, cannot be sustained; where the defendant makes the objection at the proper time, by demurrer or answer, that the complainant has a full and perfect remedy by an action at law against the defendant. *Bradley v. Bosley*, 125

2. Mode of computing damages, in a suit for the specific performance of a contract for the sale of real estate, or for compensation in damages, under a decree directing a master to ascertain and

report the damages which the vendee sustained by the refusal of the vendor to complete the sale. *Boyd v. Vanderkemp*, 273

See INJUNCTION, 17, 18, 19, 20.

## DEBTS.

*What is the primary fund for the payment of.*

1. The personal estate of a testator is the primary fund for the payment of debts; notwithstanding the will contains an express dedication of a portion of the real estate for the payment of debts or legacies, and the testator has disposed of all his personal estate specifically. *Hoes v. Van Hoesen*, 379
2. Where the personal estate is not, in terms, exonerated from the payment of debts or legacies, and where the debts and legacies are not declared to be chargeable upon the real estate exclusively, an interest in personal property not disposed of by the will is not exonerated; but is the primary fund for the payment of legacies as well as debts. *ib*

## DEBTOR AND CREDITOR.

See CREDITOR'S BILL.

## DECLARATIONS.

The declarations of a party to a sale, or transfer, going to destroy or take away the vested rights of another, cannot, *ex post facto*, work that consequence; nor can they be regarded as evidence against the vendee or assignee. *Christie v. Bishop*, 105

## DECREE.

1. *What is a final decree.*

1. What must be the character of a decree to make it a final decree. *Coithe v. Crane*, 21
2. *Need not contain an award of execution.*
2. The statute allows the court of chancery to enforce its decrees by execution.

And to entitle a party in whose favor a decree has been made to an execution thereon, it is not necessary that the decree itself should contain an award of execution. The successful party is entitled to an execution as a matter of right, unless the decree itself prohibits the issuing of an execution thereon. *Otis v. Forman*, 31

3. *Pro confesso, effect of, as an admission.*

3. *It seems*, that where a bill is taken as confessed against a defendant, before his death, and after his death the suit is revived against his heirs, or his personal representatives, they must apply to vacate the order, taking the bill as confessed, if they wish to controvert the allegations in the bill, or to set up any defence except such as has arisen since the entry of such order. *Christie v. Bishop*, 105

4. The heirs and personal representatives of a defendant who has suffered a bill to be taken as confessed against him, are bound by his implied admissions; arising from his neglect to put in an answer. *ib*

4. *In a suit for a divorce on the ground of adultery.*

5. A decree of divorce in an adultery case may reserve to the wife, who is the complainant, the right to go before a master and get his report as to a proper allowance to her for alimony. *Coolidge v. Cooledge*, 77

6. Where, in a suit by the wife for a divorce, the husband has made advances of money to her, for the expenses of the suit, *pendente lite*, the decree should direct the taxing officer, upon the taxation of the costs of the wife, under the decree, to allow to the husband the amount of his advances, in diminution of the taxable costs; after deducting from such advances the reasonable expenses and counsel fees which have been paid by the wife, and which are not included in the ordinary taxed bill. Or, the court itself should determine whether any, and if any, what allowances should be made for extra expenses and counsel fees, beyond the taxable costs; and should direct that the residue of the advances, which have been made by the husband, be deducted, by the taxing officer, upon the taxation of the costs under the decree. *Kendall v. Kendall*, 619

**5. In mortgage cases where guarantor is a party.**

- 7** Form of decree in foreclosure suit where the mortgagor is himself a party to the suit, and is primarily liable for the payment of the deficiency, and where a third person is made a party defendant, who is only secondarily liable for a part of the mortgage debt. *Jones v. Stienbergh*, 250

**C. On a bill for specific performance.**

- 8.** Upon a bill praying for the specific performance of a contract for the sale of land, or for a compensation in damages, filed by the vendee, against the vendor, and a subsequent purchaser who had notice of the complainant's rights, where the answer of the subsequent purchaser admits that he purchased with notice of the complainant's claim to the premises, and where the bill has been taken as confessed by the other defendants, the proper decree, if the court considers the other material allegations in the bill have been proved, is to direct a specific performance of the contract by the subsequent purchaser, in whom the legal title to the land is vested; so as to give to the complainant the land itself, with the improvements, if any, which he has made thereon, upon his paying the sum originally agreed to be paid by him, with interest. And it is erroneous, in such a case, to decree a compensation in damages, to the complainant, for the non-performance of the contract. *Boyd v. Vanderkemp*, 273

- 3.** Upon a bill of that nature, the complainant is not entitled to any decree against a defendant, in whose name, as the agent of the vendor, the bill alleges the contract for the sale of the premises to the complainant to have been executed, by a sub-agent; where such defendant has no interest in the controversy, and is not charged with having done any act, as agent, which was fraudulent or inequitable, nor with having had notice of the contract made by such sub-agent, in his name, until after the sale of the premises to a second purchaser. *ib*

**7. Entered by consent cannot be appealed from.**

- 10.** A decree or order entered by consent of both parties, before a vice chancellor, cannot be appealed from, although both parties consent that either may appeal. *Tarvis v. Palmer*, 379

**8. Construction and effect of.**

- 11.** Where a decree allows a mortgagor to redeem, on paying the amount to be reported due to the mortgagee, within a specified time after the confirmation of the master's report, but omits to declare what shall be the effect of an omission to redeem, the construction and effect of such a decree is, that if the party fails to pay the money within the time specified, his right to redeem is barred. *Sherwood v. Hooker*, 650

- 12.** By the common law, an order or decree of the court of chancery did not have the effect to transfer the legal title to land or real estate. But the court exercised its jurisdiction, in the case of trusts, by compelling the holder of the legal estate, or of a power in trust by which such legal estate could be conveyed, to convey the legal title pursuant to the directions of the decree. And such is still the effect of the orders and decrees of the court, except so far as the provisions of the revised statutes have given to them the effect of a legal transfer, or the effect of authorizing a transfer in a mode not sanctioned by the common law. *In the matter of Van Wyck*, 566

**9. Opening, and setting aside.**

- 13.** A final decree, which has been regularly entered, upon a bill taken as confessed, will not be set aside upon the mere affidavit of the defendant that he is advised he has a good defence on the merits. He must either state the nature and facts of his defence in the affidavit, or he must move upon the sworn answer which he proposes to put in; so that the court can see what that defence is. And in either case, the complainant is entitled to service of a copy of the answer or affidavit upon which the motion is based. *Goodhue v. Churchman*, 596

- 14.** Where the whole defence in a suit rests upon the information and belief of a part of the defendants, as to matters which they have derived from some of their co-defendants, to justify the opening of a regular decree, upon an answer setting up those matters, such answer should be served upon the complainant's solicitor, together with an affidavit of the person who furnished the information which constitutes the alleged defence. *ib*

- 15.** The objection that a decree is erro-

neous, and is not warranted by the allegations in the bill upon which it is founded, affords no sufficient ground for vacating such decree upon motion. *ib*

16. If a decree is erroneous, in that respect, the remedy of the party injured is by an application for a rehearing; or if the decree has been enrolled, by a bill of review. *ib*

#### 10. Who bound by.

See CORPORATION, 1.

### DEED.

1. Where a deed, executed previous to the revised statutes, conveyed certain premises to a trustee, upon a mere naked trust; in the first place, for the use and benefit of M. C., a married woman, and her heirs and assigns forever; and *secondly*, to convey the premises to such person or persons as she should, by will, or by her certificate in writing, during her life, and after the death of her husband, designate; and if no such last will and testament should be made, or certificate given, then to convey the premises to her heirs after her death; *Held*, that the trustee was a mere naked trustee of the legal estate, with a bare power in trust to convey the premises to her devisee, grantee or heirs; either during her life or afterwards. And that the equitable interest of the *cestui que trust* was turned into a legal estate in the premises, in fee, by the operation of the 47th section of the article of the revised statutes relative to uses and trusts; especially after the death of her husband. *Frazer v. Western*, 220

2. *Held also*, that the whole beneficial interest in the trust property belonged absolutely to the *cestui que trust*, with the single exception that she could not alienate the same during the joint lives of herself and her husband, without his consent; nor without the concurrence of the trustee. *ib*

3. *Held further*, that, upon the death of her husband, the *cestui que trust* became absolutely entitled to the land, for all purposes; and that the estate to which she was then entitled in equity, under the provisions of the trust deed, was an absolute right to the possession of the property and to the receipt of

the rents and profits thereof, and the power to dispose of the same to any person, by deed or will. And that in case of her death without will, and without alienating it in her lifetime, it would descend to her heirs at law, in the same manner as if the legal title had been conveyed to her at the time she acquired her equitable interest in the property, by the deed of trust. *ib*

4. Whether the *cestui que trust* would not have had the right to devise the premises, during the life of her husband, so as to vest the legal title in the devisee, without any conveyance from the trustee, under the provisions of the revised statutes relative to powers, in connection with the operation of the 47th section of the article relative to uses and trusts? *Quære.* *ib*

### DEFAULT.

#### 1. Opening.

*After what time.*] After a bill had been regularly taken as confessed for more than nine years, and after a regular decree had been made, against all the defendants, for more than five years, *Held*, that it was too late for a part of such defendants to apply to be let in to answer the bill, and set up a meritorious defence. *Boyd v. Vanderkemp*, 273

*To let in an unconscientious defence.*] It is the settled practice of the court of chancery not to set aside a regular order taking a bill as confessed, to enable a defendant to set up an unconscientious defence. And where the defence is usury, the court requires the defendant to undertake that he will not avail himself of that defence, except as to the amount of the usurious premium. *Quincy v. Foot*, 496

*To let in a technical defence.*] The fact that arbitrators were not sworn merely constitutes a technical defence to a bill filed to enforce the performance of their award; and the court of chancery will not open a regular order to close the proofs, and a decree founded thereon, for the purpose of allowing the defendant to prove such a defence. *Winship v. Jewett*, 173

See SURREGATE, 3.

### DESCENT.

See DOWER.



# DISCOVERY.

See BILL OF DISCOVERY.

# DISTRIBUTION.

1. Where a reversionary interest in personal property is not disposed of by the will of a testator, it does not necessarily belong to those who may happen to be his next of kin at the termination of the particular estate or interest in such property which is bequeathed by him. But, as an interest in property undisposed of by the will, it belongs to the widow and next of kin of the decedent, who were entitled to distributive shares in such unbequeathed interest at the death of the testator. *Hoes v. Van Hoesen*, 379

And if any of the parties entitled to such distributive shares die without disposing of their interests therein, their shares will go to their personal representatives, as a part of the personal estate of such decedents. *ib*

See WILL.

# DIVORCE.

## 1. Evidence in suits for.

1. Where a bill against a husband, for a divorce, contained a general charge that the defendant, between the day of his marriage with the complainant, in March, 1843, and the 30th of September, 1844, had been guilty of adultery with some female in the city of New-York, and an issue was framed in the words of that general allegation, and upon the trial no attempt was made to prove any act of adultery in the city of New-York, or at any other place, except by implication from the stains upon the defendant's linen, supposed to be the stains arising from libidinous intercourse; *Held* that the jury were not authorized in finding a verdict for the complainant upon such evidence. *Ferguson v. Ferguson*, 604

2. It is not necessary, in order to bastardize the issue, that the evidence in a suit for divorce, should be such as to render it impossible that sexual intercourse should have taken place between the husband and wife. It is sufficient if it proves beyond a reason-

able doubt that no such intercourse did take place, during the usual period of gestation, previous to the birth of the child. *Van Aernam v. Van Aernam*, 375

3. The complainant, in a suit for a divorce, who asks for a decree declaring the children of the defendant illegitimate, must produce some further evidence of his non-access, than the mere fact that his wife was living in adultery with another person. *ib*

4. The object of requiring a jury trial in suits for a divorce, on the ground of adultery, where the adultery is denied, is to protect the rights of the defendant. And the court will not make a decree of divorce where there is reason to doubt the fact of his guilt. *ib*

## 2. New trial of feigned issue.

5. It is the duty, and is within the power of the court of chancery, to grant a new trial of a feigned issue, on a bill for a divorce, where there is reason to believe the defendant has been unjustly found guilty of adultery. *ib*

## 3. Advances to be deducted from costs.

6. In a suit for a divorce, on the ground of adultery, if the wife obtains a decree for costs against her husband, she is not entitled to collect the whole amount of her taxable costs, if a sum has already been advanced to her, or to her solicitor, or next friend, on account of such costs, *pendente lite*. *Kendall v. Kendall*, 610

7. But the allowance to her for costs and expenses of the suit is not confined to the mere taxable costs as between party and party. In litigated cases, where the wife is necessarily subjected to extra expenses and counsel fees, in addition to the taxable costs as between party and party, the whole amount which has been advanced to her, *pendente lite*, for costs and expenses, should not be deducted from the ordinary bill of costs as between party and party, to which she is entitled under the decree. And the husband should be allowed only for the balance of his advances, after deducting therefrom the necessary expenditures of the wife for counsel fees, &c., which are not included in the ordinary taxed bill. *ib*

See DECREE, 5, 6

4. *Decree for.*

9. The court of chancery, upon dissolving the marriage contract for the adultery of the wife, is not authorized to declare one of her children illegitimate, who must have been begotten before the commission of the adultery charged in the complainant's bill. *Van Aernam v. Van Aernam*, 375

10. Where the wife of the complainant was for several years living in the same place with him, as the concubine or kept mistress of another person, the husband in the meantime making no exertions to break up the adulterous intercourse; *Held* that, in the absence of evidence of non-access, the complainant must be presumed to be the father of the children begotten upon his wife during that time; and that he was not entitled to a decree declaring such children to be illegitimate. *ib*

5. *Suit for, when terminated.*

10. A suit for a divorce, on the ground of adultery, is terminated by a final decree directing a divorce with or without costs, and which contains no reservation of a right to the wife to apply for alimony. And the wife, after her remarriage to another husband, in conjunction with such second husband, may apply to the court, by petition, for an order giving to her the care and custody of a child of the first marriage, without reviving the suit. *Cook v. Cook*, 639

6. *Power of court over children, in suits for.*

11. The power given to the court of chancery, by the statute, in a suit for a divorce, to direct as to the care and custody of the children, either before or after the final decree, is a mere collateral power. *ib*
12. The object of the statute, in giving to the court of chancery the power to direct which of the parties, in suits for divorce, shall have the care and custody of the minor children, where the husband is the guilty party, was not to gratify the wishes of the parents, but to protect and provide for the children of the marriage. *ib*

7. *Costs. See COSTS, 11 to 13. DECREE, 5.*8. *Allowance for expenses. See ALIMONY*

## DOWER.

1. Where a son takes land by descent from his father, subject to the dower of his mother in the same, and her dower is afterwards assigned to her, such assignment relates back to the death of the father; so as to deprive the widow of the son, who died in the lifetime of his mother, of dower even in the reversion of the third of the estate which is assigned to the mother for dower. *Matter of Cregier*, 598
2. Where an estate comes to the husband or wife by purchase, subject to the mere contingent right of dower of the wife of the grantor in case she survives him, the grantee becomes seised of a present estate in the whole premises, subject only to a contingent right of dower in one third thereof. And upon the death of such grantee, during the life of the widow of the grantor, the husband, or wife, of such grantee, is entitled to an estate by the curtesy, or in dower, in the whole premises; subject only to the incumbrance of the prior right of dower in one third of that estate, during the actual continuance of that right. *ib*
3. But where an estate comes to a person by descent, as heir at law, he takes it subject to the present right of dower of the widow of the decedent; and the assignment of dower to the widow of the ancestor relates back to the time of the death of such ancestor, so as to prevent the seisin of the heir at law as of a present estate, in the third of the premises assigned to the widow during her life. *ib*
4. The legal effect of such want of seisin, of a present estate during coverture will be to deprive the surviving husband, or wife, of the heir, who dies during the continuance of such estate in dower, of any right to have curtesy, or dower, in that part of the premises, even after the death of the widow of the ancestor. *ib*
5. Where the widow of the father has dower assigned to her in the whole of the land, before the widow of the grandfather has been endowed—whether such assignment was voluntary or was obtained by suit against the son and heir—if the widow of the grandfather is subsequently endowed, the widow of the father, after the death of the widow whose claim was paramount, will be

entitled to be restored to her dower in the whole premises; in the same manner as if the title of her husband had been conveyed to him by the grandfather in his lifetime, instead of coming to him by descent subject to the immediate right of his mother to a life estate in one third thereof. *ib*

6. In a case where two widows are claiming dower as against the infant heir, in the same part of the estate, simultaneously, the grandmother is to be considered as first endowed of one third of the infant's share; which endowment, by relation, defeats the seisin of the father of the infant, from the time of the descent cast upon him, as to that third; and the mother of the infant is only entitled to one third of the other two thirds, as her dower. *ib*

## E

### EVIDENCE.

- 1 Upon a hearing on bill and answer, documentary evidence cannot be read to show facts not stated in the pleadings. *Anonymous*, 73
2. The complainant, in a suit for a divorce, who asks for a decree declaring the children of the defendant illegitimate, must produce some further evidence of his non-access than the mere fact that his wife was living in adultery with another person. *Van Aernam v. Van Aernam*, 375
3. The answer of one defendant is not evidence against his co-defendant, except in those cases where the defendants are either legally or fraudulently combined; so as to create a unity of interest between them. *Christie v. Bishop*, 105

See ADMISSIONS.  
DIVORCE, 1, 2.

### EXAMINATION.

1. *Of complainant, as a witness.*
- 1 To entitle a complainant to an order authorizing him to be examined as a witness, to prove the facts stated in his bill, against an absent defendant who has not appeared in the cause, it should be stated in the bill, and sworn to, that

the complainant has not the means of proving the matters which he wishes to establish, except by his own oath, without an answer and discovery from the absent defendant. *Anonymous*, 408

#### 2. *Of a co-defendant as a witness.*

2. Upon an application for leave to examine a co-defendant as a witness, there must be an affidavit that the person proposed to be examined is not interested in the matter to which he is to be examined. An affidavit of the solicitor that he is advised and believes such person is a competent witness, is not sufficient. *The American Life Ins. and Trust Co. v. Sackett*, 585

See WITNESS.

#### 3. *Of witnesses.* See COSTS, 33.

#### 4. *Of defendant, on interrogatories.*

3. Where a defendant is ordered to be examined upon interrogatories, before a master, upon a report that his third answer is insufficient, he is not entitled to answer the interrogatories by written answers to be drawn up by his counsel. But he must attend and be examined personally by the master; who is at liberty to repeat the interrogatories until he is satisfied that they are fully answered by the defendant. *Higbie v. Brown*, 120

5. *Of defendant under order of reference to appoint a receiver.*

See CREDITOR'S BILL, 21 to 24.

### EXCEPTIONS.

#### I. TO MASTER'S REPORT.

1. *What questions can be raised by.*
1. It is irregular for a party, by new exceptions to a master's amended report, to raise the same questions which have been considered and decided by the court on the exceptions to the original report. *Clark v. Willoughby*, 68
2. A party cannot, by excepting to a master's report, which has been properly made pursuant to the instructions of the court as contained in the order of reference, indirectly review the decision of the court in giving such instructions. But if he is dissatisfied with the order of reference, he must apply for a re-hearing thereof directly, or must appeal. *ib*

2. *Form of.*

3. Where a master reports that an answer is insufficient in the matters of several exceptions thereto, and the defendant takes but one general exception to the report, such exception cannot be sustained if the answer is insufficient as to the matter of either of the exceptions allowed by the master. And this principle applies to the case of a second answer referred upon the original exceptions, and reported insufficient in the matters of several of those exceptions. *Higbie v. Brown*, 320

4. Where either of the exceptions to an answer has been fully answered, and the master reports that the answer is insufficient in the matter of that and of other exceptions, the defendant should only except to so much of the master's report as certifies that the answer is insufficient in respect to the exception which is fully answered. *ib*

5. A defendant may take one general exception to a master's report, so far as it is against him. But he does it at his peril, if it is found that his exception covers too much. *ib*

3. *When they will not lie.*

6. No exception can be taken to a master's report where the master has merely refused to disobey the directions contained in the order of reference. *Clark v. Willoughby*, 68

7. The remedy, for a neglect of the master to execute a part of the order of reference, is not by excepting to his report, but by a motion to refer the report back to the master, to amend it in that respect. *Stevenson v. Gregory*, 72

## II. TO MASTER'S CERTIFICATE.

8. Where a master makes a certificate allowing several interrogatories for the examination of a defendant, and the defendant takes but one general exception to the certificate, it seems such exception cannot be sustained if the certificate is proper as to either of the interrogatories. *Higbie v. Brown*, 320

## III. TO ANSWER.

9. Where a defendant has submitted to the exceptions taken to his first answer for insufficiency, or they have been allowed by the master, upon a reference thereof, it is too late for him, upon a

reference to a second or third answer upon those exceptions, to insist that the original exceptions were not well taken, and that the further discovery called for is immaterial. *ib*

## EXECUTION.

1. *Decree need not contain an award of.*

1. The statute allows the court of chancery to enforce its decrees by execution. And to entitle a party in whose favor a decree has been made, to an execution thereon, it is not necessary that the decree itself should contain an award of any execution. The successful party is entitled to an execution as a matter of right, unless the decree itself prohibits the issuing of an execution thereon. *Otis v. Forman*, 31

2. *Cannot issue against a bankrupt.*

2. An execution cannot issue against a party who has been discharged under the bankrupt act, and whose discharge is a bar to the collection of the damages directed to be paid by a decree which was made before the proceedings in bankruptcy were instituted; although the amount of such damages had not been liquidated, by the master, at the time of the discharge of the bankrupt. *Boyd v. Vanderkemp*, 273

3. Where a defendant has been discharged under the bankrupt act, subsequent to the decree against him, for a debt which is provable under the act, it is irregular for the complainant to take out an execution, against the defendant, upon such decree; without a previous application to the court for leave to issue such execution. *ib*

4. It is irregular to issue an execution, upon a judgment, or decree, which is prima facie discharged by a bankrupt certificate, so as to be no longer in existence as a subsisting debt against the defendant, or his property; without a previous application to the court, and upon due notice to the discharged bankrupt. *Alcott v. Avery*, 347

5. And where the creditor of a bankrupt, who has been discharged subsequently to the decree, issues an execution against his property without having taken any steps to test the validity of such discharge, the court of chancery will grant relief, by setting the execution aside, upon motion. *ib*

See BANKRUPTCY.

3. *Should not be made returnable on Sunday.*

6. It is irregular to make an execution returnable on Sunday. But in general the court will permit process thus defective to be amended, in order to promote the purposes of justice. *Boyd v. Vanderkemp*, 273

4. *Where to be returned and filed.*

See CREDITOR'S BILL, 13.

5. *Practice on setting aside for irregularity.*

7. Where an execution was set aside for irregularity, the court directed that the defendants should not be permitted to bring an action against the complainant, or his solicitor, for any thing done under it. *ib*

## EXECUTORS AND ADMINISTRATORS.

### I. ACCOUNTING BEFORE SURROGATE.

#### 1. *Rendering account.*

1. The rendering of an account to the surrogate, by an executor or administrator, and the settlement of that account after it has been rendered, are not one proceeding; though the latter frequently is a mere continuation of the former proceeding. The revised statutes authorize the surrogate, after the expiration of eighteen months, to make an order requiring the executor or administrator to render an account of his proceedings. And such order may be made upon the application of a person having a claim upon the estate of the decedent, either as creditor, legatee, or next of kin, or of any person in behalf of a minor having such a claim. Or, it may be made by the surrogate, by virtue of his office, and without any application on the part of those who are interested in the estate. *Westervelt v. Gregg*, 469

2. The statute also directs the manner of rendering such account; and authorizes the examination of the executor or administrator on oath. And when that is done it completes the rendering of the account, and terminates the proceeding; unless the executor or administrator has asked for a final settlement of the account; or some person interested in the estate has applied for

the payment of his debt, or legacy, or distributive share. *ib*

3. *Examining executor on oath.*] An executor or administrator may be examined on oath, upon the mere rendering of an account by him; but such examination must be before the surrogate himself. For he is only authorized to appoint an auditor, to examine and report upon the accounts, where there is to be a settlement of the accounts, either final or otherwise. *ib*

#### 2. *Settling account.*

4. Where an executor or administrator applies for a final settlement, the surrogate, after the account has been rendered, is authorized to adjust and settle the same. And for this purpose, any person interested in the estate may surcharge, or falsify the account; and witnesses may then be examined in relation to the matters in dispute between the parties. And in such cases, the surrogate may refer the accounts to an auditor, or auditors, to examine and report thereon. *ib*

5. Although the executor or administrator does not ask for a final settlement, by any proceeding on his part, the surrogate has power to decree the payment of debts, legacies, and distributive shares, out of the funds of the estate in the hands of the executor or administrator. *ib*

6. Where an application is made to the surrogate, by a creditor, or by a legatee who is entitled to a legacy of a specified amount, if the executor or administrator denies that the fund in his hands is sufficient to pay that and all other claims which are entitled to a preference, or to an equality in payment, the surrogate is authorized to adjust, or settle, the account of the executor or administrator; for the purpose of ascertaining whether the claimant is entitled to a decree for the payment of the whole of his debt, or legacy, or only of a part thereof. *ib*

3. *Application by a creditor, legatee, or next of kin, for an account.*

7. Where the executor has not already rendered his account to the surrogate, a creditor, or legatee, who seeks for payment of his debt, or legacy, may, in his petition, ask for an account, and also for the payment of such debt, or

- legacy. And after the account has been rendered if its correctness is disputed, the surrogate may proceed to settle the same, so far as concerns the rights of those parties, and may make his decree, as to the payment, accordingly. *ib*
8. A residuary legatee, or a person who is entitled to a distributive share, may also proceed in the same manner, to have the account of the executor or administrator liquidated and settled; so as to obtain his residuary or distributive share of the estate of the decedent. *ib*
9. *Petition.*] But in either case, if the applicant, in his petition to the surrogate for an account, has not asked for the payment of his debt, or legacy, or distributive share, but merely that the executor may render an account, he must make a new, or further, application to the surrogate, stating the nature and extent of his own claim upon the fund, and his objections, if any, to the account rendered by the executor or administrator; and asking that the account may be settled and adjusted, and that he may be paid the amount of his claim, or so much thereof as he may be entitled to, out of the fund in the hands of such executor or administrator. *ib*
10. Where the petition, presented to a surrogate by a legatee, asked for no relief whatever except that the executor might be ordered to render an account according to law; *Held* that the surrogate having granted the prayer of the petition, his jurisdiction under that petition was exhausted; and that no settlement of the account of the executor could properly be directed, without the presenting of a new or farther petition, praying for the settlement and adjustment of the account, and the payment of the distributive share of the petitioner. *ib*
11. *Where share belongs to a married woman.*] Where a distributive share of the estate of a decedent belongs to a married woman, the petition to the surrogate, asking for the payment of such distributive share, must be presented in the joint names of such married woman and her husband; and not in the name of the husband alone. *ib*
12. *Oath of executor to account.*] Upon proceedings before the surrogate, against an executor, to compel the rendering of an account by him, the executor should be permitted to verify his account by his oath. And for the protection of the rights of others, the surrogate should in all cases require such account to be rendered on oath. *ib*
13. *Order that executor render account.*] An order may be granted by a surrogate, after the expiration of eighteen months from the time letters of administration are issued, that the executor or administrator render an account of his proceedings; upon the application of a creditor, legatee, or next of kin of the decedent. Or such an order may be made by the surrogate *ex officio*, without any application by a party interested in the estate. *Gratacap v. Phylis*, 485
14. But where the order is made by the surrogate *ex officio*, the proceedings are different from what they are when it is made upon the application of some person interested. In the first case, it may sometimes be proper for the surrogate to make an absolute order in the first instance; as it is a matter resting in his discretion whether he will require an account of the administration of the estate, although no person interested thinks proper to institute a suit for that purpose. It is a proper exercise of such discretion for the surrogate *ex officio*, to require an account from the executor or administrator, whenever, in his opinion, the rights of minors, who are interested in the estate as legatees or next of kin, render such an account advisable. *ib*
15. *Notice to guardians &c. of minors.*] On the rendering of such an account, if it appears that the executor or administrator has money in his hands belonging to minors, the surrogate should notify the guardians, or relatives of the minors of the fact; so that the fund may be received and properly invested for the benefit of those to whom it belongs. *ib*
16. *Notice to executor.*] But in the case of an application by or on behalf of a person claiming to be interested in the estate, as a creditor, legatee, or next of kin, an absolute order to account should not be made in the first instance, and without notice of the application to the executor or administrator. *ib*
17. *Citation to show cause.*] The surrogate, upon the presenting of the petition

for an account, in such a case, should direct the executor or administrator to be cited to appear and show cause, at a specified time, why an order that he render an account of his proceedings should not be granted; so as to give him an opportunity to object that the affidavit, as to the debt claimed to be due to the applicant, is insufficient, or that he is not interested in the estate as a legatee, or as next of kin, &c. And the party cited may show, in answer to such application, that the right of the applicant to an account is barred by a release or otherwise. *ib*

18. *Order for an inventory and account—Validity and amount of debt.*] As a general rule, however, if a creditor swears positively to a debt due to him from the decedent, he will be entitled to an order for an inventory, and an account of the estate. And the surrogate will not proceed to try the validity of the debt, or inquire as to the amount thereof, upon a mere application for an account; where the petitioner does not pray for the payment of the debt. *ib*

19. *What interest applicant must have.*] Even a contingent interest in the estate is sufficient to entitle the party, having such interest, to an order that the executor or administrator render an account. *ib*

20. *Cannot be called to account as trustees.*] Where executors hold a fund not in their character of executors, but as trustees, they cannot be called to account before the surrogate in relation to the execution of the trust. *In the matter of Van Wyck,* 565

## II. WHEN NOT BOUND TO PAY INTEREST.

21. Where an executor is liable to be called upon at any time, by a legatee, for the amount of his legacy, so that such executor cannot safely invest the money, he will not be required to pay interest thereon; in the absence of any proof that he has mingled the trust fund with his own moneys, or that he has used it in any way so as to make it produce interest. *Burtis v. Dodge,* 77

22. Where no time is fixed in a will for the payment of a legacy, it is payable at the expiration of one year from the time of the testator's death, and will not commence drawing interest until that time. *ib*

## III. ALLOWANCES AND COMMISSIONS.

23. An executor is not entitled to charge the estate with a counsel fee, paid by him upon the final settlement of his account before the surrogate; or for drawing up his accounts in a proper and legal form on such final settlement. *ib*

24. A surrogate is not authorized to make an arbitrary allowance to an executor, in lieu of the compensation directed by the statute to be paid to advocates and proctors in surrogates' courts; where the same is to be paid as costs in the suit, either by the adverse party, or out of the fund in litigation. *it*

25. An executor is not entitled to commissions on the share of a legatee, which share the will directs to be deducted from the valuation of a farm, specifically devised to the legatee, upon his paying to the executors the residue of the appraised value of such farm. *ib*

## IV. WHAT EVIDENCE THEY MAY REQUIRE OF JUSTICE OF CLAIMS.

26. What evidence may be required by an executor, of the justice of a claim presented against the decedent's estate. *Williams v. Harden,* 298

## V. EXECUTORS APPOINTED IN OTHER STATES.

### 1. *Their rights here.*

27. *It seems* that executors duly appointed in another state, have a right to take charge of and control personal property of the testator situated here; where there is no conflicting grant of letters testamentary in this state. *Brown v. Brown,* 189

### 2. *When to be cited to take out letters here.*

28. Where stocks are held in this state by a citizen of another state, at the time of his death, and he dies in that state, leaving a will executed there, the remedy of his residuary legatee, if he wishes to obtain the proceeds of such stocks and the dividends which have accrued thereon, after the debts and general legacies of the testator have been paid, is to cite the executors to prove the will and to take out letters testamentary thereon in this state; and if they neglect to do so, to have himself, or some other person, appointed administrator with the will annexed, here. *ib*

3. *Whether they can be called to account here.*

29. Whether, upon a bill filed before the chancellor himself, the court will entertain a suit to call foreign executors or administrators to account, where the executor or administrator is within the jurisdiction of the courts of the state where he was appointed, and where there is nothing in the bill to show that the complainant has not a full and perfect remedy in those courts? *Quære. ib*

30. As a general question of expediency, it seems that persons having claims upon a decedent's estate should be compelled to resort to the courts of the country where the decedent was domiciled, and where the personal representatives of such estate were appointed; especially where the claimants are not creditors, but stand in the characters of legatees or distributees of the decedent. *ib*

31. The statute gives to the executor, or the administrator with the will annexed, who may be appointed in this state, and to him only, the right to call the foreign executor to account, for the wrong done to the estate. *ib*

# VI. THEIR RIGHTS AND POWERS, GENERALLY.

32. It seems, if the court of chancery discharges one of several executors without appointing a new trustee in his place, the remaining executors would not be authorized to execute a power in trust to sell the testator's real estate; so as to give a good title to purchasers. *In the matter of Van Wyck,* 565

33. None of the provisions of the revised statutes authorize a part of the executors, to whom a joint power is given by the testator, to execute the same, so as to transfer a good title to the purchaser, where one of those to whom such joint power was given has been discharged from his trust by the court of chancery, after he accepted the trust, and had duly qualified as executor. *ib*

34. The court of chancery has no power to appoint an executor. *ib*

# VII. RESIGNATION AND DISCHARGE OF.

35. It seems, the power given to the court of chancery, upon petition, to accept the resignation of a trustee and to dis-

charge him from his trust, in certain cases, does not extend to the case of an executor, so far as relates to his power to sue for and collect debts due to the testator; or as relates to his liability to creditors, legatees, and next of kin, on account of the personal estate which may have come to his hands. *ib*

36. Where a testator, by his will, created a trust as to certain distributive shares of a mixed fund, consisting of the personal estate and the proceeds of the real estate, which shares he directed his executors to invest, as trustees for certain persons, for their respective lives, and then to pay over the principal to their appointees by will, or in default of such appointment, to those who might be their heirs or next of kin at the termination of their respective life estates: *Held*, that where the duties which belonged to the executors, in their character of executors merely, had been fully discharged, and the division of the estate made, the court of chancery had the power to accept the resignation of one of such executors and to appoint another in his place, as one of the trustees to hold the funds set apart for the legatees of the testator. *ib*

*Costs. See Costs, 2 to 5*

## F

### FEIGNED ISSUE.

*See Idiots &c.*

### FORECLOSURE SUITS.

#### 1. Affidavit of merits.

1. The affidavit of merits, in a mortgage case, under the 91st rule, need not be made by the defendant himself. It is sufficient if it be made by his solicitor *Banks v. Walker,* 74

#### 2. Parties.

2. The heirs of a subsequent mortgagee are not necessary parties to a bill to foreclose a prior mortgage; the executor of the decedent representing his rights as second mortgagee. *Shaw v McNish,* 326

3. A person who sells a bond and mortgage for less than the amount due



thereon; and actually guaranties the payment of the whole debt, is liable to be made a party to a bill of foreclosure in this court; and the complainant may have a decree over against him for the deficiency, if any there be, to the extent of the money paid on the sale, with legal interest thereon. *Jones v. Stienbergh*, 250

4. Where it appeared, in a suit brought by the assignee of a mortgage to foreclose the same, that it was the intention of the assignor to give to such assignee the right to receive the moneys due upon the mortgage, and to foreclose in his own name, and to apply the proceeds of the mortgage to the payment of certain debts for which the complainant was holden as the surety for the assignor; *Held* that a decree in such suit would be a perfect protection to the defendants therein, and to those who might become purchasers under the decree, against any claim of the assignor or of the creditors whose debts were thus provided for; and that it was unnecessary to make the assignor, or the creditors, parties. *Christie v. Her- rick*, 254

5. Where a mortgage is assigned as a mere security for the payment of a debt, or where but a part of the mortgage debt is assigned to the complainant, the assignor is a necessary party to a bill filed to foreclose such mortgage. *ib*

6. But where there is an absolute and unconditional assignment of a bond and mortgage, and the assignee subsequently files a bill to foreclose the mortgage, it is not necessary to make the assignor a party. *ib*

7. The same principle is applicable, *it seems*, to the case of an absolute assignment of a bond and mortgage to a third person in trust, to collect the amount due thereon, and apply the same to the payment of the debts of the assignor. *ib*

### 3. Set-off.

8. A defendant in a foreclosure suit is not entitled to have set off, against the mortgage debt, an unliquidated claim for damages upon an injunction bond which was given subsequent to the commencement of the suit. *Thompson v. Ellsworth*, 624

### 4. Decree.

9. It is a matter of course, on making a decree of foreclosure and for the sale of the mortgaged premises, upon a mere suggestion that separate portions of such premises are held, or claimed, by different persons, under conveyances or mortgages which are subsequent to the mortgage to the complainant, to insert provisions in the decree which will enable the master to sell in such a manner as to protect the equitable rights of the defendants respectively. *The New-York Life Ins. & Trust Co. v. Milnor*, 353

10. Under the usual provision inserted in decrees in such cases, if the grantee of a portion of the premises is, by virtue of his conveyance, entitled to a right of way, or other easement, in the residue of the premises which belonged to his grantor subsequent to such conveyance, it will be a matter of course for the master to sell such residue subject to the right of way, &c. in favor of the owner, or purchaser, of the dominant tenement, and of the heirs and assigns of such owner or purchaser. *ib*

11. Where it is suggested, at the time when the decree of foreclosure and sale is applied for, that the mortgaged premises are held by the several defendants in parcels, the proper direction, to be inserted in the decree, is that if it shall appear to the master who makes the sale that separate parcels of the mortgaged premises have been conveyed, or encumbered by the mortgagee, or by those claiming under him subsequently to the lien of the complainant's mortgage, such master shall sell the mortgaged premises in parcels, in the inverse order of their alienation; and according to the equitable rights of the parties as such subsequent grantees or incumbrancers, as such rights shall be made to appear to the master. *ib*

12. A person who has secured the payment of a part of the mortgage debt, by his personal obligation, is within the equity of the provision of the revised statutes authorizing the court of chancery to make a decree against a third person who is liable for the mortgage debt; and may be decreed to pay the deficiency, if the mortgaged premises do not sell for sufficient to pay so much of the debt as he has guarantied the payment of, and including the costs of foreclosure and sale. *Jones v. Stienbergh*, 250

5. *Rights of purchaser from defendant.*

13. Rights of a purchaser from a defendant in a foreclosure suit, who purchases after decree *pro confesso*. *Bank of Utica v. Finch*, 75

See COSTS, 15 to 22.

JURISDICTION, 4, 12.

RECEIVER.

## FRAUD.

1. In cases of fraud, a court of equity has jurisdiction, although the party seeking its aid might have obtained relief in an action at law. *Bradley v. Bosley*, 125
2. It is a settled principle of equity, in all cases of fraud, that if the party who has been defrauded is entitled to come into this court for any relief, arising out of the contract as to which he has been defrauded, and where it is necessary for him to allege and establish the fraud in order to obtain such relief, he may obtain full relief here, without resorting to a suit at law; although as to a part of the relief claimed, he had a perfect remedy in an action at law for damages. *ib*
3. Where, by the fraud of the vendee, a part of the price of the estate sold in fact remains unpaid, although the vendor supposed he had been paid in full at the time, there is no waiver of the equitable lien of the vendor for the part of the price that actually remained unpaid. *ib*

See AGREEMENT.

VENDOR AND PURCHASER.

## G

## GRANT.

See BRIDGES.

## GUARANTY.

See FORECLOSURE SUIT, 3.

## H

## HABITUAL DRUNKARDS.

See INTOXICATION, &c.

## HEARING.

1. Upon the argument of a cause before a vice chancellor, it is the duty of each party to furnish his opponent with a copy of his points, and also to have a copy marked by the clerk. *Beatty v. McNaughton*, 319
2. Copies of the points made by each party, on the hearing before the vice chancellor, should be furnished to the chancellor upon the appeal. *ib*

## HEIRS.

1. Heirs, who are liable to creditors of their ancestor in consequence of lands having descended to them, must be sued jointly, for such liability, and not separately. *Cassidy v. Cassidy*, 467
2. Where there is a fund in court belonging to infants, the chancellor, as the guardian and protector of their rights, may, in his discretion, upon a summary application, order it to be applied for the payment of any just claim against the infants. Or, if the claim is contested, or is doubtful, he may require the claimant to establish his right by suit against the infants; or upon a reference to a master. *ib*
3. But where an adult heir, whose share of a fund is in court, as well as the infant heirs, is liable to contribute towards the payment of the debts of the ancestor, the creditors should be left to proceed in the usual way, by suit against all of the heirs jointly. *ib*

See JURISDICTION.

## HUSBAND AND WIFE

## I. MARRIAGE SETTLEMENT.

1. *Wife's separate estate, how far bound by.*
  1. The general personal estate of a female infant is bound by a settlement made upon her marriage, where the property is of such a character that the husband would become entitled to it immediately, upon the marriage, were it not for such settlement. *Strong v. Wilkin*, 9
  2. And in cases where the husband takes the legal title to his wife's personal es-

tate, by virtue of the marriage, charged with her equity, such a settlement made by him, even after the marriage, with power to her to dispose of the property by will, would be binding upon the wife's equitable interest in the property; the husband being entitled to the immediate possession and absolute control of such property, upon making a reasonable provision for the wife and her children. *ib*

2. *Husband, when bound by.*

3. Where the husband takes the legal title to his wife's personal estate, by virtue of the marriage, charged with her equity, a settlement made by him, even after the marriage, with power to her to dispose of the property by will, would at law be binding upon him, in the event of his surviving her. *ib*

II. ABILITY OF WIFE TO MAKE A WILL, OR EXECUTE A POWER.

4. The article of the revised statutes relative to wills of personal property, and the probate of them, which provides that every male person of the age of eighteen years and upwards, and every female *not being a married woman*, of sixteen years or upwards, of sound mind, &c. *and no others*, may execute a will of his or her real or personal estate, does not prevent the execution by a feme covert of a power of appointment of personal estate, by will, where the legal title of such estate is in trustees with power to her to appoint the same by an instrument in the nature of a will. *ib*
5. A will of personal property, made by an infant feme covert, previous to the revised statutes, is a good execution of a power of appointment under a marriage settlement authorizing her, at her decease, to dispose of the capital of the fund in such manner as she might by will direct; although her death did not take place until after the revised statutes went into operation. *ib*
6. Under the article of the revised statutes relative to powers, a married woman may execute a power, either by grant or by devise, according to the authority given by such power. *ib*
7. The testamentary instrument which a married woman executes under a power of appointment, either as to her real or personal estate, is not strictly a will; nor does it operate as such in the proper legal sense of the term. It operates

as an appointment; and the devisee or legatee takes the property by the force of the power. *ib*

8. A feme covert cannot, under the provisions of the revised statutes, make a will of her general personal estate, during coverture; founded upon the mere assent of the husband to the making of such will. *Moehring v. Mitchell*, 264
9. And it seems that she cannot dispose of her separate estate by will, unless such will is made in pursuance of a power, either beneficial or in trust, to dispose of her separate estate by will, or by a testamentary instrument in the nature of a will. *ib*

10. But a feme covert having personal estate conveyed to her separate use, with an express power to dispose of it by will at her death, may make a will, or an instrument in the nature of a will; for the purpose of appointing, or disposing of such property, in pursuance of such power. *ib*

III. WIFE'S INTEREST IN TRUST PROPERTY.

11. As a feme covert cannot create a debt which will be binding upon her personally, her interest in the future rents and profits of real estate, cannot be reached by a creditor's bill under the provisions of the 57th section of the article of the revised statutes relative to uses and trusts. *L'Amoureux v. Van Rensselaer*, 34
12. And as she cannot pledge or create a charge upon, her interest in the rents and profits or income of trust property, in anticipation, and as she cannot contract a personal liability upon which a judgment can be recovered, her interest, even in the surplus income which is not necessary for her support, cannot be reached, except for a debt contracted before marriage. *ib*

IV. WIFE'S POWER TO MAKE A CONTRACT OF INSURANCE.

13. Where a married woman procured a policy of insurance, upon the life of her husband, in her own name, and for her sole use, as authorized by the act of April, 1840, the insurance money being made payable to her children in case she should die before her husband, and subsequently both husband and wife, and their only child, perished at sea.

by the same disaster, and probably at the same moment; *Held*, that the act of April, 1840, did not extend to the case; and that this contract of insurance stood upon the same footing as any other contract made by a feme covert, in her own name, in the lifetime of her husband, and without the intervention of a trustee. *Moehring v. Mitchell*, 264

#### V. SUITS UPON BONDS &C. GIVEN TO WIFE.

14. At common law the husband may sue upon bonds, notes, and other contracts for the payment of money, given to the wife during coverture, either in his own name, or in the name of himself and wife jointly; at his election. *ib*

15. Where he elects to treat them as his own, by bringing a suit in his own name only, the judgment will belong to his personal representatives, although his wife survives him. But if he sues in their joint names, the judgment will belong to her, by survivorship, if he dies first. *ib*

16. Where a bond or other security is taken in the name of a married woman, during coverture, the husband may elect to treat it as his own property, and may bring a suit thereon in his own name; or, he may treat it as the property of the wife, and bring a suit in the name of both. *Thompson v. Ellsworth*, 624

17. Where a distributive share of the estate of a decedent belongs to a married woman, the petition to the surrogate, asking for the payment of such share, must be presented in the joint names of such married woman and her husband, and not in the name of the husband alone. *Westervelt v. Gregg*, 469

#### VI. WIFE'S RIGHT BY SURVIVORSHIP.

18. Where the consideration of a bond, or other security taken in the name of the wife, has proceeded from her or her estate, or where it was the gift of a third person, if the husband does not dispose of such security, or collect the money due thereon, or proceed to judgment thereon in his own name during his lifetime, it seems the debt will belong to her, by survivorship, if she outlives him. *Moehring v. Mitchell*, 264

#### VII. SUIT BY HUSBAND, FOR A SEPARATION.

19. To sustain a bill, by a husband against his wife, for a separation from

bed and board, under the provisions of the 12th section of the act of the 10th of April, 1824, it is not sufficient for him to show a single act of violence on her part, towards him, or even a series of such acts; so long as there is no reason to suppose that he will not be able to protect himself, and his family, by a proper exercise of his marital power. *Perry v. Perry*, 511

20. In such a suit it is material that the husband should establish such a continued course of bad conduct on the part of the wife, towards himself and those who are under his protection and care, as to satisfy the court that it is unsafe for him to cohabit or live with her. Hence, it is not impertinent to state, in a bill of this nature, acts of violence and misconduct, on the part of the defendant, towards the complainant's children and other members of his family. *ib*

#### VIII. AGREEMENTS BETWEEN.

21. An agreement between husband and wife, as to the custody of their children, made previous to a decree for divorce, will not have a controlling influence upon the decision of the court with respect to the care and custody of such children. *Cook v. Cook*, 639

#### IDIOTS, LUNATICS AND HABITUALLY DRUNKARDS.

##### 1. Notice to lunatic, of execution of commission.

1. A person proceeded against as a lunatic, except in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time to produce his witnesses before the jury. But it is not necessary that notice should be served on him personally where it is evident he keeps out of the way to avoid service of the notice. *In the matter of Russell*, 38

##### 2. Inspection of lunatic by jury.

2. The jury, upon the execution of a commission of lunacy, have a right to inspect and examine the lunatic; and they should do so, in every case of doubt, when practicable. *ib*

3. Order to produce.] In such cases they should direct the person in whose

custody the lunatic is, to produce him, or to permit him to attend before them. And when such an order is made, either by the court or by the commissioners, the person who prevents the attendance of the lunatic before the commissioners and jury will do it at his peril. *ib*

3. *Discharge of inquisition by court.*

1. This court has a right to discharge an inquisition of lunacy, upon a mere examination of the alleged lunatic, in connection with the evidence produced before the jury; without subjecting him to the expense of an issue or a traverse, where upon such an examination and evidence it is evident that the jury erred. *ib*

5. But where no change has taken place in the situation of the lunatic, since the execution of the commission, it must be a very clear case of mistake, or of undue prejudice on the part of the jury, to authorize the court to do so. *ib*

6 The court will not discharge an inquisition upon *ex parte* affidavits, contradicting the finding of the jury, without any excuse being given for neglecting to produce the deponents as witnesses before the commissioners. *ib*

4. *Feigned issue.*

7 Although it is not a matter of course to allow a feigned issue, in a lunacy case, when asked for, it is proper to allow it whenever the court entertains a reasonable doubt as to the justice of the finding of the jury, upon the execution of the commission. *ib*

5. *Committee.*

2. *Bond.*] The bond given by the committee of a lunatic or an habitual drunkard should be made payable to the people of the state, or to the register or clerk in whose office it is to be filed. *In the matter of White,* 43

9. *When court will not restrain him, by injunction.*] Where a bill was filed against the committee of a lunatic, to correct an alleged error in the amount of a mortgage, taken by the committee upon the sale of the lunatic's estate under an order of a vice chancellor, and such bill was dismissed upon the merits, and where the mortgagor had appealed from the decision, which appeal was still pending, the chancellor refused to grant an injunction to re-

strain the committee from proceeding to foreclose the mortgage under the statute. *Outtriv v. Graves,* 49

10. *Purchaser from, how relieved.*] It is not necessary for a purchaser from a committee, under an order of the court of chancery, to file a bill to obtain an equitable deduction from a security taken upon the sale; but the court may give relief upon a summary application. *ib*

11. But a committee who has consented to have the rights of the parties litigated upon a bill filed, cannot afterwards object that he had been proceeded against, in that manner, without leave of the court by which he was appointed. *ib*

*See COSTS, 7.*

*PARTITION, 4.*

I

IMPERTINENCE.

*See HUSBAND AND WIFE, 20.*

IMPROVIDENCE.

*See ADMINISTRATION, 1, 4*

INCUMBRANCERS.

*See COSTS, 14.*

INFANTS.

*See JURISDICTION, 1.*

*BILL OF REVIVOR.*

INJUNCTION.

I. WHAT CASES GRANTED.

1. *To restrain proceedings in equity for an account.*

1. An injunction will not be granted, to restrain a party from instituting proceedings in equity for an account, &c. where the complainant has an equitable defence to such proceedings, which he can set up in his answer. *Hall v. Fisher* 53

## 2. To stay proceedings at law.

2. An *ex parte* injunction ought not to be granted, to restrain a party from proceeding under a judgment and execution at law, which judgment is alleged to have been paid; where the complainant does not know, and cannot state as a fact within his knowledge, that the judgment has been paid, or that the defendant claims to sell, under the execution, for more than is justly due. *Christie v. Bogardus*, 167

3. And in no case can an *ex parte* injunction be issued, to stay the plaintiff in a judgment from proceeding against the judgment debtor or his property, without an actual deposit of the amount claimed to be due, and giving a bond with sureties, for damages and costs; or the giving of proper security for the payment of the judgment, and also for the damages and costs which may be awarded in the court of chancery. *ib*

4. Where the whole or a part of a judgment has been paid, and the plaintiff therein is proceeding to collect the whole judgment, or a part thereof which has been paid, the proper remedy of the defendant is by a summary application to the court in which the judgment was recovered. Or, if it is proper for him to come into the court of chancery, to stay the proceedings upon the judgment, he should state the fact of such payment, in his bill, and swear to it; and give notice of his application, for an injunction, to the adverse party. *ib*

## II. SECURITY, OR DEPOSIT, UPON OBTAINING.

### 1. Amount of security.

5. Although the 31st rule fixes the minimum of the penalty of a bond, to be taken by the officer allowing an injunction out of court, such officer must exercise a reasonable discretion in fixing the amount of the security to be given; so that it shall, in all cases, be sufficient to cover the probable amount of damages which the defendants may sustain by reason of such injunction. *Loveland v. Burnham*, 65

6. The officer allowing an injunction should require a bond for a larger sum than \$500, where, from the nature of the case, there is reason to suppose the damages occasioned by the injunction, if it should continue until the termination of the suit, will exceed \$500. *ib*

## 2. Justification of sureties

7. The sureties in an injunction bond should be required to justify in a sum of at least double the penalty of the bond. *ib*

### 3. Acknowledging, or proving, bond.

8. An injunction bond must be acknowledged by the obligors therein, or must be proved by a subscribing witness to the same, or it will be invalid, and the injunction issued thereon will be irregular. *ib*

### 4. Consequence of not giving security

9. Where an injunction is issued without the requisite security being given, the court will set aside such injunction, for irregularity, with costs. *ib*

### 5. On injunction to stay proceedings at law.

10. The statute is imperative, that no injunction shall issue to stay proceedings at law in any personal action, after judgment, unless a sum of money equal to the judgment and costs is paid into court, and a bond is also given for the payment of the costs and damages which may be awarded to the defendant in the suit in the court of chancery. *Christie v. Bogardus*, 167

11. But the chancellor or vice chancellor before whom the bill is filed has the power to dispense with the actual deposit of the amount of the judgment and costs, upon sufficient cause shown; and may take a bond with sureties for the payment of the judgment. *ib*

12. Even in that case, however, the complainant must give another bond for the payment of the damages and costs, which may be awarded in the court of chancery. Or, the penalty and condition of the first mentioned bond must be enlarged, so as to conform to that requirement of the statute also. *ib*

13. In no case can an *ex parte* injunction be issued, to stay the plaintiff in a judgment from proceeding against the judgment debtor or his property, without an actual deposit of the amount claimed to be due, and giving a bond with sureties for damages and costs; or the giving of proper security for the payment of the judgment, and also for the damages and costs which may be awarded in the court of chancery. *ib*

14. Upon such an application, to authorize the court to dispense with any part of the deposit, or the giving of security in lieu thereof, such court must be satisfied that the part of the amount of the original judgment as to which the security or deposit is to be dispensed with, is actually paid and satisfied. It will not be sufficient if it is merely doubtful whether the whole amount claimed is justly due upon the judgment. *ib*

15. The complainant, when he seeks to obtain an injunction to stay the collection of a judgment, without a deposit or security, must state the times, circumstances, and amount of each payment; so as to enable the court, by mere computation, to fix the amount of the deposit, or of the bond, and to enable the defendant to controvert the fact of such payments having been made. *ib*

i. A bond for the damages and costs, which may be awarded against the complainant, can in no case be dispensed with, upon the granting of a preliminary injunction to stay proceedings at law upon a judgment; although such injunction is granted upon a special application to the court, and upon the hearing of the defendant. *ib*

### III. DAMAGES UPON.

7. The purchaser of mortgaged premises, upon a foreclosure and sale thereof, is entitled to the growing crops or emblements thereon, as against the mortgagor. And as they would necessarily enhance the price which the mortgaged premises would bring at such sale, it is proper to allow the value of the crops, &c. taken off by the mortgagor, during the time in which the sale of the premises was suspended by an injunction, as a part of the defendant's damages sustained by reason of an injunction staying the complainant from selling the premises under his decree. *Aldrich v. Reynolds*, 613

18. The interest upon the whole sum, the collection of which is either suspended or defeated by an injunction, is also a part of the damages sustained by the defendant by reason of such injunction. *ib*

9. A party enjoined is also entitled to recover, as damages, the counsel fees which he has been obliged to pay to obtain a dissolution of the injunction;

as well as the taxable costs of so much of the proceedings in the suit as were necessary to obtain such dissolution. *ib*

20. And the costs of the reference to a master to ascertain the amount of damages, are likewise a part of the damage which the party enjoined has a right to recover, upon the dissolution of the injunction. *ib*

See SALES.  
PRACTICE 2

### INTEREST.

See EXECUTORS AND ADMINISTRATORS, 21  
22.  
INJUNCTION, 18.

### IRREGULARITIES.

Irregularities in the proceedings in a court of law can only be objected to there. They cannot be taken into consideration in a court of chancery, in a creditor's suit brought upon the judgment at law. *Barnard v. Darling*, 218

## J

### JUDGMENT.

1. Judgments rendered by justices of the peace upon attachments which were not served on the defendant personally, and to which he did not appear, are not such judgments as will entitle the owner thereof to come into the court of chancery for relief; upon the return of the executions issued thereon, unsatisfied. *Corey v. Cornelius*, 571

2. The remedy of the owner of such judgments is to bring new suits thereon; so as to give the defendant an opportunity to rebut the prima facie evidence of indebtedness, or to offset any demand which he may have. And if the plaintiff succeeds in obtaining new and general judgments, in those suits, he must proceed and exhaust his remedy against the real as well as personal estate of the defendant, by execution, before he can file a creditor's bill in the court of chancery. *ib*

3. *Docketing.*] By the first and second sections of the title of the revised statutes relative to executions, and the da-

ties of officers thereon, in connection with the other provisions of those statutes relative to the docketing of judgments and decrees, the right to sell real estate, and chattels real, on executions upon judgments of courts of common law and upon executions founded upon decrees of the court of chancery, is placed upon the same footing. And if the judgment or decree has been docketed, so as to make it a lien upon lands of the debtor in the county to which the execution is issued, it will authorize the sale of the interest which he had in the land at the time of such docketing; if the time prescribed by law for the continuance of such lien has not expired. *ib*

4. But if the judgment or decree has not been docketed, the execution issued thereon will only authorize the sale of such interest as the debtor has in the land at the time of the seizure and sale; subject to the rights of those who have acquired interests in, or liens upon, such lands as purchasers, or incumbrancers, subsequent to the judgment or decree. *ib*

5. Although the 25th section of the act of May, 1840, relative to costs and fees in courts of law, &c., provides that no judgment or decree thereafter to be entered shall be a lien upon real estate, unless the same shall be docketed by the clerk of the county where the lands are situated, yet there is nothing in that act requiring a judgment of the supreme court, or a decree of the court of chancery, to be docketed with the clerk of the county where the real estate of the defendant is situated, to authorize the issuing of an execution against such real estate, to the sheriff of that county. *ib*

6. But as the process of courts of common pleas, and of the superior court of the city of New-York, does not, in ordinary cases, extend to other counties, it is necessary to have the judgment docketed in the manner prescribed in the 29th section of the act of May, 1840, to authorize such local courts to issue their executions to any other county than that in which such courts are held. *ib*

7. The act of May, 1840, does not, in terms, dispense with the docketing of judgments in the supreme court; in the manner prescribed by the revised statutes. Nor does it authorize the

docketing of such judgments in the office of the county clerk, for the purpose of giving them a preference in payment out of the estate of the judgment debtor or in case of his death. And it seems, it is necessary the clerks of the supreme court should continue to docket judgments in the manner prescribed in the revised statutes, to entitle such judgments to a preference over subsequent judgment creditors, in payment out of an insolvent estate. *ib*

## JURAT.

See PLEADINGS, 11.

## JURISDICTION OF CHANCERY.

### 1. *Infants.*

1. Where there is a fund in court belonging to infants, the chancellor, as the guardian and protector of their rights, may, in his discretion, upon a summary application, order it to be applied for the payment of any just claim against the infants. Or, if the claim is contested, or is doubtful, he may require the claimant to establish his right by suit against the infants; or upon a reference to a master. *Cassidy v. Cassidy*, 467

### 2. *Heirs.*

2. The court of chancery has no jurisdiction, upon petition, to order a portion of a fund in court arising from the sale of real estate in a partition suit, which portion belongs to an adult heir of a deceased party to such suit, to be paid out to the creditors of the decedent. *ib*

### 3. *Where a sovereign state is a party defendant.*

3. The principle upon which the court of chancery assumes jurisdiction, in a suit to which a sovereign state is a party defendant, is not for the purpose of compelling such state to perform any decree which may be made against it; but to enable the state to appear and protect its rights, if it has any, in the suit. *Garr v. Bright*, 157

### 4. *In mortgage cases.*

4. The provisions of the revised statutes, giving jurisdiction to this court to make a personal decree against the mortgagor, or his surety, or other party who



- is personally liable for the debt, do not extend to cases where the complainant had no right to come into this court to foreclose the mortgage, as against the interest of any one in the mortgaged premises, or in any part thereof. *Mann v. Cooper*, 185
5. *With respect to the locality of the property.*
5. Even if the court of chancery has general jurisdiction to call upon executors, or administrators, appointed in another state or country to account, and to pay over the proceeds of the property of the decedent to those who are entitled to it by the law of his domicile, the fact that a single item of the personal property is situated within one of the chancery circuits, of this state, will not give to the vice chancellor of that circuit jurisdiction of the cause. *Brown v. Brown*, 189
6. The bill, in such a case, must be filed before the chancellor, or before the vice chancellor of the circuit where the defendants reside, or where the cause of action arose. *ib*
7. To give a vice chancellor jurisdiction on the ground that the subject matter in controversy is within his circuit, it is not sufficient that a small part of that subject matter is situated there. So much, at least, of the subject matter must be situate within the circuit as to enable the vice chancellor to make a decree which will do substantial justice, between the parties, with respect to that part of the subject in controversy to which his jurisdiction extends. And where that cannot be done, the bill must be filed before the chancellor, who has general jurisdiction; or before some vice chancellor who by reason of the residence of the defendants in his circuit, or otherwise, has jurisdiction to make a decree relative to the whole matter. *ib*
8. *It seems that the legislature, in apportioning the equity jurisdiction, among the vice chancellors, did not intend that in cases where the whole matter in controversy could not properly be litigated in different suits, before the chancellor, separate suits in relation to different parts thereof might be brought before the several vice chancellors within whose respective circuits such different parts of the subject matter of the suit were situated.* *ib*
9. Where executors, appointed in another state, have a right to receive from a trust company, located in one of the chancery circuits of this state, money of their testator deposited with such company, and to apply it in a due course of administration, at the place where they were appointed, and where they do thus receive it, the receipt of such money, by the executors, will not be sufficient to authorize the filing of a bill against them in that circuit, on the ground that the cause, or right of suit, arose within that circuit. *ib*
6. *Where there is no remedy elsewhere.*
10. Where the court of chancery interferes, in special cases, to protect the rights of creditors or legatees of a testator, who was domiciled abroad, as to the personal property which is found in this state, and which property is in danger of being lost or squandered before a proper representative can be appointed here to protect it, the court proceeds upon the ground that wherever there is a right there ought to be a remedy, either in this or in some other tribunal. And where no remedy to enforce the right exists elsewhere, chancery will furnish such remedy, whenever it is necessary to prevent a total failure of justice; if the property in controversy, or the person of the wrongdoer, is within the jurisdiction and control of the court. *Brown v. Brown*, 189
7. *In cases of usury.*
11. Where a defendant in a suit at law has a defence of usury, which he can establish, by a competent witness, without a discovery from the alleged usurer, but where he is so situated that he cannot avail himself of the testimony of that witness in the suit at law, he may resort to the court of chancery for relief. And he is not bound to rely upon the testimony of the real plaintiff in the suit at law to prove the usury. *Morse v. Hovey*, 404
8. *As respects amount claimed.*
12. A person holding a mortgage against the defendant's property, and also having a judgment against him, subsequent in date to the mortgage, which judgment is a lien upon the mortgaged premises, may file a bill in the court of chancery to foreclose the mortgage and to obtain payment of the judgment, although the amount due upon the mortgage is less than \$100, where the

- defendant has no other property out of which the judgment can be satisfied. *Wheeler v. Van Kuren*, 490
13. The claim of the complainant, on his judgment, in such a case, as a subsequent lien upon the premises, in connection with the averment that the judgment debtor has no other property, takes the case out of the statute requiring the court to dismiss every bill concerning property where the matter in dispute, exclusive of costs, does not exceed the value of \$100. *ib*
14. The question whether the judgment is a lien upon the premises, and is entitled to be paid out of the surplus proceeds of the sale, is one which is necessary to be decided in the suit for the foreclosure of the mortgage. And such a claim is proper to be made in the bill of foreclosure. *ib*
9. *To control exercise of discretion by commissioners.*
15. Where an act of the legislature, incorporating a bridge company, left it to the discretion of the commissioners appointed by such act, either to purchase and repair an existing bridge, or to erect a new one at some other point on the river; *Held* that the court of chancery had no power to control the exercise of that discretion; in the absence of proof that it had been exercised corruptly, or dishonestly, by the commissioners. *The Oswego Falls Bridge Company v. Fish*, 547
10. *To discharge executors, and trustees.*
16. Independent of the statutory provisions on the subject, the court of chancery has no power upon a mere petition, to discharge a trustee, or to accept his resignation and to appoint another in his place, without the consent of all persons who are, or who upon any future contingency may be, interested in the execution of the trust. *In the matter of Van Wyck*, 565
17. The usual course of proceeding for the purpose of changing a trustee, is by bill; to which all persons interested should be made parties, either actually or constructively. *ib*
18. The revised statutes have authorized the court of chancery, upon petition, to accept the resignation of a trustee and to discharge him from his trust, in certain cases. But *it seems* this statutory power does not extend to the case of an executor, so far as relates to his power to sue for and collect debts due to the testator; or as relates to his liability to creditors, legatees, and next of kin, on account of the personal estate which may have come to his hands. *ib*
11. *To appoint executors.*
19. The court of chancery has no power to appoint an executor. *ib*
12. *To enforce liens.*
20. A person having an equitable lien upon land, for the unpaid purchase money, may come into this court, in the first instance, to enforce such lien; without resorting to a suit at law to recover the amount. And as an incident to the right to enforce such lien, this court will ascertain the amount thereof. *Bradley v. Bosley*, 125
13. *In cases of trusts.*
21. By the common law, an order or decree of the court of chancery did not have the effect to transfer the legal title to land or real estate. But the court exercised its jurisdiction, in the case of trusts, by compelling the holder of the legal estate, or of a power in trust by which such legal estate could be conveyed, to convey the legal title pursuant to the directions of the decree. And such is still the effect of the orders and decrees of the court, except so far as the provisions of the revised statutes have given to them the effect of a legal transfer, or the effect of authorizing a transfer in a mode not sanctioned by the common law. *In the matter of Van Wyck*, 565
- See* CONSTITUTIONAL LAW.  
 DIVORCE, 11, 12.  
 EXECUTORS AND ADMINISTRATORS, 50, 51, 52, 55, 56.  
 SURROGATE.
- L
- LEGACY AND LEGATEE.
1. *When legacy will not draw interest.*
1. Where an executor, about a year after the granting of letters testamentary, tendered to one of the residuary legatees so much of his share of the residuary estate as the executor was able to distribute at that time; which such

legatee refused to receive until he should be paid the whole amount of his share; *Held*, that the legatee was not entitled to interest on the sum thus tendered. *Burtis v. Dodge*, 77

2. *When legacy payable.*

- 2 Where no time is fixed in a will for the payment of a legacy, it is payable at the expiration of one year from the time of the testator's death, and will not commence drawing interest until that time. *ib*

3. *When executor not bound to tender legacy.*

3. Where a residuary legatee is informed of the fact that a final dividend has been made, by the executor, to the several residuary legatees, and that the executor is ready to distribute the amount among them, and where such legatee is an adult, and competent to attend to his rights, it is not the duty of the executor to go to him and tender the amount of his distributive share; especially where the legatee has previously refused to receive a portion of his share, when it was tendered to him. *ib*

4. *What is a vested interest in legacy.*

4. An interest in the personal estate of the testator, given by his will to a legatee who is in esse, although it is not to vest in possession until after the death of another person, vests in interest in the legatee immediately upon the death of the testator; and is capable of being released by such legatee at any time. *Hoes v. Van Hoesen*, 379

5. *What is the primary fund for the payment of legacies.*

- 5 It is a general rule also, that the personal estate is the primary fund for the payment of legacies, although such legacies are charged upon real estate; whether such real estate be devised, with a direction to the legatee to pay the legacies, or is charged with such legacies, or is given to trustees for that purpose. *ib*
- 6 But in reference to legacies, an absolute and specific disposition of all the personal estate of the testator, and not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the reality in exoneration of the personality. *ib*

7. Where the personal estate is not, in

terms, exonerated from the payment of debts or legacies, and where the debts and legacies are not declared to be chargeable upon the real estate exclusively, an interest in personal property not disposed of by the will, is not exonerated; but is the primary fund for the payment of legacies as well as debts. *ib*

8. Even where the personal estate is in terms exonerated, for the benefit of a particular legatee, and not for the benefit of the estate generally, the failure of the particular bequest destroys the exoneration, *pro tanto*. *ib*

6. *Bill by legatees against executor, for an account.*

9. A bill may be filed by legatees, and those who have succeeded to their rights, without taking out letters of administration *de bonis non*, to recover from the personal representative of the deceased executor of their testator, moneys which were in the hands of such executor, and which he held as trustee for the complainants at the time of his death, and which he ought to have accounted for and paid over to them. *Goodyear v. Bloodgood*, 617

10. Where the debts and funeral expenses of a decedent have been paid, the legatees alone have an interest in compelling the personal representative of the last surviving executor to account for and pay over the moneys belonging to the estate, and which were received by such executor in his lifetime. And it is not necessary that an administrator with the will annexed, of such decedent, should be made a party to a suit brought for that purpose. *ib*

LEGITIMACY.

1. The maxim, *pater est quem nuptiae demonstrant*, is founded upon very strong reasons of policy as well as of law. And courts should not unsettle the title to property, nor put the status of any one in jeopardy, by speculating upon the mere probabilities in favor of the illegitimacy of a child who may, or may not, have been begotten by the husband of its mother. *Van Aernam v. Van Aernam*, 375
2. The ancient rule of the common law, that the husband must be presumed to be the father, if he was within the

realm during any part of the period of gestation, has long since been repudiated by the courts. *ib*

3. It is not necessary, in order to bastardize the issue, that the evidence should be such as to render it impossible that sexual intercourse should have taken place between the husband and wife. It is sufficient if it proves beyond a reasonable doubt, that no such intercourse did take place, during the usual period of gestation, previous to the birth of the child. *ib*

*See* DIVORCE, 3.

## LIFE INSURANCE.

*See* HUSBAND AND WIFE, 13.

## LIEN.

*See* PARTNERSHIP.  
VENDOR AND PURCHASER.

## LIMITATION.

### 1. *Of estates.*

1. Limitations of contingent remainders in personal property, made previous to the revised statutes, are valid; provided the absolute ownership of the property is not suspended beyond the period allowed by law. *Bryan v. Knickerbacker*, 409

### 2. *Of suits before surrogates.*

2. In analogy to the statute of limitations, suits by creditors, legatees or distributees, before a surrogate, to obtain payment of their debts or legacies, or distributive shares, should be instituted within the time in which suits of the same character are required to be commenced in the courts of common law or of equity. *McCartee v. Camel*, 455
3. In cases where the courts of common law, the court of chancery, and the surrogate's court, have concurrent jurisdiction, a suit before the surrogate must be brought within the time limited by the revised statutes for commencing the suit at law, or in chancery. But in cases in which the court of chancery and the surrogate's court alone have concurrent jurisdiction, the

suit before the surrogate should be instituted within the time prescribed for the commencement of suits of the same character in equity, in cases where the subject matter of the suit is not cognizable by the courts of common law *ib*

## LIS PENDENS.

- A purchaser of a judgment, who had not actually paid the purchase money at the time of the commencement of a suit in this court to set aside a sale under such judgment, is not entitled to protection as a bona fide purchaser, as against the complainant's equity. *Christie v. Bishop*, 105

## LUNATICS.

*See* IDIOTS, &c

## M

## MAIL.

*See* PRACTICE, 7.

## MARRIAGE SETTLEMENT.

*See* HUSBAND AND WIFE, 1 to 3.

## MASTERS' SALES

*See* SALES.

## MASTER'S REPORT.

1. Where a master's report, upon the hearing of exceptions to the same, is sent back to be amended, it is not open for review generally by the master; unless the court expressly authorizes him to review it generally, or the nature and scope of the exceptions allowed necessarily embrace the whole subject matter of the account originally taken by the master. *Clark v. Willoughby*, 68
2. The usual order nisi, to confirm a master's report, which is entered upon the filing of such report, becomes absolute at the expiration of eight days, except as to the matters embraced in

the exceptions to the report. And the decretal order, made upon the exceptions, need not direct the report to be confirmed as to those parts thereof which are not directed to be altered or reconsidered by the master. *ib*

- 3 The remedy, for a neglect of the master to execute a part of the order of reference, is not by excepting to his report, but by a motion to refer the report back to the master, to amend it in that respect. *Stevenson v. Gregory*, 72

### MASTER AND WARDENS OF NEW-YORK.

1. The powers given to the master and wardens of the port of New-York by the 5th section of the act of February, 1819, were in the nature of a franchise; and were in their nature exclusive, until the legislature should think proper to repeal or modify the law, or should authorize other persons to perform the same duties. *Tyackv. Brumley*, 519
2. The statute creates or provides for the appointment of public officers, and devolves upon them certain powers and duties which the interest of the public requires should be performed by persons duly authorized and selected in the mode prescribed by the legislature. And it is a usurpation of power for another body of men, under a different name of office, to attempt to perform the duties assigned to the port wardens, and to establish a tariff of fees of office for the discharge of such duties. *ib*
- 3 The chamber of commerce and the board of underwriters, of the city of New-York, have no right to appoint a board of public agents to discharge the *ex officio* duties which the legislature has previously imposed upon a board of officers to be appointed by the governor and senate. *ib*
- 4 Port wardens, by the common law, were not *ex officio* surveyors of damaged vessels or damaged goods. And the exclusive powers originally conferred, by statute, upon the master and wardens of the port of New-York, as surveyors, having been taken away by the act of 1819, such master and wardens are no longer *ex officio* surveyors of damaged goods imported into the city of New-York; except in the cases

specified in the fifth section of that act, viz: when such damaged goods are required to be sold, by the owner or consignee, on account of such damage, and for the benefit of underwriters who do not reside in New-York. *ib*

5. But as the statute does not prohibit the master and wardens from acting as surveyors in cases not mentioned in the act of 1819, it is proper to have a tariff of fees which shall apply to other surveys, in case they shall be made by such master and wardens, as had been done previous to that act. The granting of a fixed rate of fees for particular services, however, does not, even by implication, give to the master and wardens the exclusive right to perform such services; nor does it interfere with the right of others to perform similar services for such persons as may think fit to employ them. *ib*

### MAXIMS.

The maxim, *pater est quem nuptiæ demonstrant*, is founded upon very strong reasons of policy as well as of law. And courts should not unsettle the title to property, nor put the *status* of any one in jeopardy, by speculating upon the mere probabilities in favor of the illegitimacy of a child who may, or may not, have been begotten by the husband of its mother. *Van Aernam v. Van Aernam*, 375

### MISTAKE.

See SALES.  
SHERIFF.  
SURROGATE.

### MORTGAGE.

See DECREE, 7.  
FORECLOSURE SUIT.

### N

### NON-IMPRISONMENT ACT.

The effect of the 39th section of the act of 1831, to abolish imprisonment for debt and to punish fraudulent debtors

was to repeal so much of the provisions of the title of the revised statutes, relative to courts held by justices of the peace, as authorized the execution, issued in a suit commenced by attachment, where the defendant was not personally served with process and did not appear therein, to be levied upon the goods and chattels of the defendant generally. That section also repealed, by implication, so much of the provisions of that title of the revised statutes, as made the filing of the transcript of such a judgment, in the county clerk's office, a lien upon the real estate of the defendant, and as authorized the county clerk to issue an execution, against such real estate, founded upon the filing of such transcript. *Corry v. Cornelius*, 571

### NUISANCE.

Two or more persons having separate and distinct tenements, which are injured, or rendered uninhabitable, by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the tenements of both, may join in a suit to restrain such nuisance. *Murray v. Hay*, 59

## O

### OATH.

*Waiver of, to answer.*

*See PRACTICE, 10.*

### ORDERS.

#### 1. Operation and effect of.

1. By the common law, an order or decree of the court of chancery did not have the effect to transfer the legal title to land or real estate. But the court exercised its jurisdiction, in the case of trusts, by compelling the holder of the legal estate, or of a power in trust by which such legal estate could be conveyed, to convey the legal title pursuant to the directions of the decree. And such is still the effect of the orders and decrees of the court, except so far as the provisions of the revised statutes have given to them the effect of a legal transfer, or the effect of authorizing a transfer in a mode not sanctioned by

the common law. *In the matter of Van Wyck*, 563

2. It seems the act of April, 1845, in relation to the powers of receivers, and of committees of lunatics and habitual drunkards, does not have the effect to transfer the title of real estate to a receiver, by the mere order of the court, and without an actual conveyance from the party to the suit, in whom the legal title is vested. *Wilson v. Wilson*, 592

#### 2. Time, how computed upon.

3. Where an order extends the time for doing an act for a certain number of days, without saying, after service of the order, the time for doing the act is restricted to the number of days mentioned therein; whether the order is served personally, or is served by mail, or upon the agent of the adverse solicitor. *Johnson v. Quackenbush*, 292

#### 3. To produce witnesses.

4. An order to produce witnesses may be either in the form originally used, requiring the adverse party to produce witnesses within forty days, or in the more modern form requiring the parties to do so. *Murray v. Hay*, 59

#### 4. To close proofs.

5. Under an order to produce proofs, the right to close the proofs, at the expiration of the time limited by the practice of the court, is reciprocal in the respective parties. And where an order, requiring the defendant to produce proofs, within forty days after service of notice thereof, is served on the defendant's agent, neither party can enter an order to close the proofs until after the expiration of eighty days. *Johnson v. Quackenbush*, 292

#### 5. To show cause why an attachment should not issue.

6. An order requiring a defendant to show cause why an attachment should not issue against him for a contempt, in not attending before a master pursuant to an order of the court made in a creditor's suit, should give to the defendant at least four days to attend before the master, and to pay the costs, prior to the time appointed for showing cause. *Hammersley v. Parker*, 25
7. The time for attending before the master, in such a case, may be enlarged by the court, for good cause shown. *Id*

6. *Of reference to a master to appoint a receiver.*

8. Form of the order of reference to a master to appoint a receiver, in a creditor's suit, where the defendant appears, but does not give the consent mentioned in the 191st rule. *Green v. Hicks*, 309

9 The order requiring a defendant to attend before a master and comply with the order of reference in a creditor's suit, and to pay the costs, or show cause why an attachment should not issue against him, should specify the amount of the costs which the defendant is to pay. *Hammersley v. Parker*, 25

10. Eight dollars is the sum usually inserted in such an order; unless the court, for special reasons, sees fit to direct a larger sum to be paid. *ib*

7. *Service of, upon an agent.*

11. Where the complainants entered an order to produce proofs, and served it on the agent of the defendant's solicitor, and the defendant, on the last day allowed by the rule for that purpose, applied for and obtained an order, extending the time to take proofs for sixty days, which order was served on the register as the agent of the complainant's solicitor; and about forty days after the expiration of the sixty days, allowed by this order, the defendant entered an order to close the proofs; *Held* that such order was regular. *Johnson v. Quackenbush*, 292

12. Although the 16th rule directs that where the service of a notice or paper is upon an agent, or through the post office, there must be double the time of service which would be requisite were the service upon the solicitor in person, the service of an order which merely enlarges the time to take proofs does not come within the provisions of the rule. *ib*

13. Where the object of the service of a paper or notice is to restrict the rights of the adverse party, in case he does not act upon it within the time required by the practice of the court, the 15th rule gives him double the ordinary time when such service is made upon an agent, or through the post office. *ib*

14. *Aliter*, where the notice or paper served enlarges, instead of restricts, the time within which the party, upon

whom it is served, was previously bound to do the act required. *ib*

See DEFAULT.

P

PARTIES.

1. *General rule.*

1. It is a general rule that all persons materially interested in the subject matter of the suit ought to be made parties; and that the *cestui que trust*, as well as the trustees, should be brought before the court. But it seems the case of assignees or other trustees of a fund for the benefit of creditors, who are suing for the protection of the fund, or to collect moneys due to the fund from third persons, is an exception to the general rule that the *cestui que trust* must be made a party to a suit brought by the trustee. *Christie v. Herrick*, 254

2. *Joinder of.*

2. There is no inflexible rule as to joinder of parties in the court of chancery. Yet, as a general principle, several complainants, having distinct and independent claims to relief against a defendant, cannot join in a suit for the separate relief of each. *ib*

3. Nor can a single complainant, having distinct and independent claims to relief against two or more defendants severally, join them in the same bill. *ib*

4. But there are many exceptions to this rule; and the court exercises a sound discretion, in determining whether there is a misjoinder of parties, under the particular circumstances of each case. *ib*

See CREDITOR'S SUIT, 16.

NUISANCE.

3. *Agents.*

5. Persons cannot be made parties defendants, in the court of chancery, on the ground of their being the agents of a party interested, where no specific relief is asked against them; and where the bill contains no allegation that they acted as such agents in relation to the transaction in question, or that they had any interest in, or connection with, the subject matter of the litigation. *Garr v. Bright*, 157

6. It is erroneous to make a mere agent, a party to a suit for the specific per-

formance of a contract. And if he is made a party, the complainant will not be entitled even to a decree for costs against him; although he suffers the bill to be taken as confessed for want of an answer. *Boyd v. Vanderkemp*, 273

#### 4. Assignees, and personal representatives.

Where a complainant, or appellant, in a suit in the court of chancery, assigns his interest in the subject matter of the suit, *pendente lite*, either absolutely or conditionally, and obtains a re-assignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the court by a bill in the nature of a bill of revivor. But in such a case the assignor, who has subsequently been restored to his former rights, may proceed in the same manner as if no such assignment had been made. *Scouten v. Bender*, 647

8. Where, upon an application by the complainants, in a creditor's suit, for leave to proceed against the surviving defendants, after the death of a co-defendant, it was shown by affidavit that all the judgment debtors were insolvent at the time the bill was filed: *Held* that this afforded no excuse for proceeding in the cause without bringing before the court the representatives of a deceased defendant; and the assignee in bankruptcy of some of the other defendants, who had been decreed to be bankrupts subsequent to the commencement of the suit. *Penniman v. Norton*, 246

9. *Held also*, that if the surviving defendants had no property, or effects, which could pass to their assignee in bankruptcy, subject to the complainant's lien thereon, or if the deceased defendant had no interest in any property, which could pass to his personal representatives or heirs, subject to such lien, the fact should be distinctly shown, by affidavit; in order to excuse the complainants from bringing such assignees, or representatives, before the court. *ib*

*See* CREDITOR'S BILL, 14, 15.

#### 5. Attorney general.

10. Principles upon which the attorney general is made a defendant, where the state is interested. *Garr v. Bright*, 157

#### 6. Effect of waiving all claim against a person.

11. A complainant may sometimes avoid the necessity of making particular persons parties, by waiving all claim against them in his bill. But this cannot be done to the prejudice of the rights of others, who are defendants in the suit. Thus, it cannot be done where it is necessary to take an account against the defendant; and where he has a right to have other persons, who are interested in the taking of the account, before the court, to save the necessity of a future litigation with them. *Dart v. Palmer*, 92

*See* FORECLOSURE SUIT, 2 to "

### PARTITION

1. Where a bill for partition is filed; and the complainant subsequently dies, and his devisee thereupon files a bill to revive and continue the proceedings in the original suit, it is no objection to this last bill that the complainant is an infant; and was therefore incapable of commencing an original suit for the partition of lands. *McCosker v. Brady*, 329
2. A report of commissioners in partition must be signed by all the commissioners. Or if not so signed, it should state the reason of the omission. *Underhill v. Jackson*, 73
3. It should also state that all the commissioners met together and consulted, &c. where a sufficient reason is given for its not being signed by all. *ib*
4. Where a share of premises partitioned is set off to a lunatic, or to an habitual drunkard, the title is vested in him, and not in his committee. *ib*

*See* BILL OF REVIVOR.

### PARTNERSHIP.

1. Upon the dissolution of a copartnership by the death or bankruptcy of one or both of the copartners, the creditors of the firm obtain a quasi lien upon its property and effects; which the court of chancery may work out for them, in administering the equities between the copartners or their representatives. *Ketchum v. Durkee*, 486



2. But where there has been a bona fide sale of the copartnership effects from one partner to another, upon the voluntary dissolution of a solvent firm, and without reserving any lien thereon for any purpose, the creditors of the copartnership have no equitable lien upon such effects as against the claims of creditors of the partners to whom such sale was made. *ib*
3. And where creditors of the partner to whom the sale of the effects of the firm was made have obtained a legal lien upon such effects, by the levy of an execution thereon, they are entitled to retain their lien, as against the vendor and the creditors of the copartnership. *ib*
5. The insertion of a prayer for multifarious relief, *it seems*, will render a bill multifarious, if the court, at the hearing, would, upon the case made by the bill, be required to grant such relief, in addition to granting the relief which not multifarious. *Murray v. Hay*, 51
6. But where multifarious relief is not prayed for in the bill, it is not a matter of course to give it, at the hearing, under the general prayer; in addition to the relief in which the complainant have a common interest. *ib*
7. *What amounts to an allegation of insolvency.*] An allegation, in a bill, that a person died insolvent, does not imply that he died entirely destitute of property, but only that his property was not sufficient to pay all his debts, in full. *Dart v. Palmer*, 92

## PATENT.

See CONVEYANCE.

## PLEADINGS.

### I. BILL.

1. *Frame and construction.*
  1. *Of a bill with a double aspect.*] Where a bill, for partition, alleged that a pretended will under which the defendants claimed title to a part of the premises was invalid, and prayed that it might be annulled and cancelled, and declared void; or, in case the same should be decreed to be valid, then that the complainant might have a partition of the premises; *Held* that the prayer or a partition was inconsistent with the case made by the complainant's bill. *McCosker v. Brady*, 329
  2. *Held* also, that if the complainant was ignorant whether the alleged devise to the defendants was valid or invalid, the statements in the bill, as well as the prayer for relief, should have been so framed as to present the case in a double aspect. *ib*
  3. Frame of a bill with a double aspect, and a prayer for relief in the alternative; as the facts may appear. *ib*
  4. *Multifariousness.*] Where a bill contains no statements which can entitle the complainant to a decree for a partition in the suit, the mere prayer for a partition, in a particular event contemplated by such prayer, does not render the bill multifarious. *ib*
5. *Impertinence.*] In a suit by a husband against his wife for a separation, it is material that the husband should establish such a continued course of bad conduct on the part of the wife, towards himself and those who are under his protection and care, as to satisfy the court that it is unsafe for him to cohabit, or live with her. Hence, it is not impertinent to state, in a bill of this nature, acts of violence and misconduct, on the part of the defendant, towards the complainant's children and other members of his family. *Perry v. Perry*, 516
2. *Prayer.*
  10. Where a complainant, in his bill, claims specific relief against the defendant, and then adds a general prayer for such further or other relief as may be proper, and the case made by his bill entitles him to the specific relief prayed for, and when no other parties are necessary to entitle him to that relief, the court, at the hearing, will not grant other or further relief, under the general prayer, if persons not before the court are necessary parties to such other or further relief; although the case made by the bill would have entitled the complainant to that relief also.

if all the proper persons had been made parties. *Dart v. Palmer* 92

### 3. Jurat.

1. The jurat to a bill of complaint is not rendered defective by the want of the statement of the county where the bill was sworn to. *Barnard v. Darling*, 218

See DEMURRER.

## II. DEMURRER.

- 12 Where a complainant, in his bill, claims specific relief against the defendant, and then adds a general prayer for such further or other relief as may be proper. And asks for a discovery as to some fact not material to the specific relief prayed for; and which discovery can only be material to a different kind of relief, to the granting of which relief other persons are necessary parties, *it seems* the defendant may demur to that part of the discovery, upon the ground of a want of proper parties. *Dart v. Palmer*, 92
3. If the case made by the bill entitles the complainant to particular relief, against the defendant, and would also entitle him to further relief were the necessary parties before the court, and where the prayer of the bill specifically asks for the more extended relief, to which the complainant is not entitled in consequence of the defect of parties, the defendant may demur to the whole bill for want of parties. *ib*

See BILL OF REVIVOR.  
BILL OF DISCOVERY.  
BILL OF REVIEW.  
CREDITOR'S BILL.  
SUPPLEMENTAL BILL.

## POINTS.

See HEARING.

## PORT WARDENS

See MASTER AND WARDENS.

## POWERS.

By the revised statutes, where a power in trust is vested in several persons, all

must unite in its execution. But if, previous to such execution, one or more of such persons dies, the power may be executed by the survivor or survivors. *In the matter of Van Wyck*, 565

See HUSBAND AND WIFE, 4 to 10.

## PRACTICE.

### I. AMENDING BILL.

1. Effect of amending bill after the original bill is taken as confessed. *The Bank of Utica v. Finch*, 75

See CREDITOR'S BILL.

### II. MOTION FOR RECEIVER.

2. The pendency of a motion for leave to amend the bill is no objection to a motion for a receiver; provided the defect in the bill is not fatal, or does not render the bill demurrable. *Barnard v. Darling*, 76
3. The pendency of a motion to dissolve an injunction is no objection to the appointment of a receiver. *ib*
4. Where a motion is pending in the supreme court to set aside the judgment on which a creditor's bill is founded, this court will direct a motion for a receiver to stand over until the motion to set aside the judgment can be made and decided. *b*

### III. SERVICE OF PAPERS.

1. *What is a good service.*
5. Where an answer was served, during the absence of the complainant's solicitor from his office, by delivering such answer to the clerk, at the door of the office, as he was about to open and enter the office, and such clerk immediately afterwards opened and entered the office, and took the answer in with him; *Held*, that it was a good service, although the clerk was not actually in the office when the answer was delivered to him. *Quincy v. Foot*, 497
6. It is not absolutely necessary that a paper should have been filed at the moment the copy thereof is served, provided it is filed the same day; unless some proceeding has been taken in the mean time, to render such subsequent filing improper. But the service of a paper is not perfect until the ori-

ginal is actually delivered to the proper officer to be filed. *ib*

2. *Service by mail.*

7. Papers served by mail, under the 14th rule of the court of chancery, must be served by putting them into the post office at the place where the solicitor making the service resides. *Corning v. Gullman*, 649

See REGISTER IN CHANCERY.

IV. FILING PAPERS.

8. It is not absolutely necessary that a paper should have been filed at the moment a copy thereof is served, provided it is filed the same day; unless some proceeding has been taken in the meantime to render such subsequent filing improper. *Quincy v. Foot*, 497

V. PETITION.

9. It seems, that in a proper case, the court may allow the complainant to proceed by petition, for leave to take out an execution upon his decree, notwithstanding the discharge of the defendant under the bankrupt act. But the defendant must be served with a copy of such petition, and with notice of the time and place of presenting the same. *Alcott v. Avery*, 347

VI. WAIVER OF ANSWER ON OATH AS TO ONE OF SEVERAL DEFENDANTS.

10. Where several persons who are made defendants, in the court of chancery, have no joint and common interest, so that the answer of one will not be evidence for or against the other upon the hearing of the cause, the complainant may waive an answer on oath as to one of them, and may call for a sworn answer and a discovery from the other. *Morse v. Hovey*, 404

VII. NOTICE OF MOTION.

11. When a notice of motion must specify the grounds of the motion. *Hanna v. Curtis*, 263

VIII. STAYING PROCEEDINGS AT LAW.

12. Where proceedings are stayed upon a second verdict, in a suit at law, until an application for a new trial can be made, it is irregular for the plaintiff to take out an execution upon a judgment which has been ordered to stand as security for the amount of such second

verdict. And he will not, by issuing such execution, entitle himself to have an injunction renewed, which had previously been dissolved in consequence of the granting of the new trial upon the first verdict. *Drew v. Dwyer*, 101

See INJUNCTION

PRESUMPTION.

1. *Of survivorship.*

1. Where the mother and daughter perished at sea, and by the same disaster, and there was no evidence of survivorship; *Held*, that there was no legal presumption that the daughter survived the mother. *Moehring v. Mitchell*, 264

2. *It seems* that where the husband and wife perished together, at sea, and where there is no evidence to authorize a different conclusion, it will be presumed that the husband survived his wife. *ib*

2. *Of legitimacy.* See LEGITIMACY.

3. *Of death.*

3. Where one of the next of kin of the decedent, and who was entitled to a distributive share of his estate, left her domicile of origin, in the city of New-York, and went to reside at a place near the city of Baltimore, and continued to correspond with her mother and sisters in the city of New-York, but had not answered their letters for about twelve years previous to the death of the decedent, but there was nothing else to raise a legal presumption of her death; *Held*, that the administrator of the decedent was not justified in paying the share of the estate belonging to the absentee, to her sisters, without making inquiries at the last known place of residence of the absentee, to ascertain whether she was living or dead. *McCartee v. Camel*, 455

4. Where a person has not been heard from in seven years, and when last heard from he was beyond sea, without having any known residence abroad, the legal presumption is that he is dead. *ib*

5. This presumption has been adopted by analogy to certain provisions of the revised statutes, particularly the sections relative to the presumption of the death of persons upon whose lives estates in

lands depend, where such persons have remained beyond sea, or absented themselves, in this state or elsewhere, for seven years together. *ib*

6. But the only presumption arising from such a protracted absence is, that the absentee is dead, if he has not been heard from within the seven years; not that he died at any particular time within the seven years, or even on the last day of that term. *ib*

7. Even where a person whose existence is in question has remained beyond sea for seven years, if he had a known and fixed place of residence in a foreign country when he was last heard from, he ought not to be presumed to be dead, without some evidence of inquiries having been made for him at such known place of residence, and without success. *ib*

8. Where the person, whose death is to be presumed, is in fact within the United States and not technically beyond sea, absenting himself *in this state or elsewhere*, as used in the statute, means absenting himself from his last place of residence in this state, or in the United States, which was known to his family or his relatives. *ib*

9. The mere fact that a person has absented himself from the place of his birth, or from his original domicile, for more than seven years, does not raise a presumption that he is dead. *ib*

## PRINCIPAL AND AGENT.

1. A general agent, for the sale of lands, is not responsible for the non-performance of a contract made by an authorized sub-agent, without his knowledge. *Boyd v. Vanderkemp*, 273
2. But the principal is in law chargeable with notice of a contract duly made by a sub-agent whom the general agent has appointed, under an authority given to him, for that purpose, by such principal. *ib*

See PARTIES, 5.  
SALES.

## PUBLIC ADMINISTRATOR.

1. Whenever the property of an intestate, of which the public administrator in

the city of New-York is entitled to take charge, exceeds the sum of \$100 in value, the latter must serve a personal notice upon the widow and all the relatives of the decedent, who are entitled to any share of his estate, if they are to be found in the city, of the intention to apply to the surrogate for letters of administration. And in all cases where the notice is not personally served it must be published for four weeks. *Proctor v. Wanmaker*, 302

2. And where letters of administration are granted, by the surrogate, to the public administrator, without a personal service of the citation upon the widow and relatives of the decedent, or the publication of a notice in the manner directed by the revised statutes, such grant will be irregular; and the letters of administration may be revoked. *ib*

3. The 31st and 32d sections of the title of the revised statutes relative to public administrators, were not intended to deprive the widow, or next of kin, of the right to have the grant of administration to the public administrator vacated and set aside for irregularity where it has been improperly obtained without a compliance with the directions of the statute on that subject; although the application for that purpose is not made within the time limited by those sections, in respect to cases where all the proceedings of the public administrator have been correct and regular. *ib*

## PURCHASERS

### 1. How far entitled to protection.

1. A purchaser of a judgment, who has not actually paid the purchase money at the time of the commencement of a suit in this court to set aside a sale under such judgment, is not entitled to protection, as a bona fide purchaser, as against the complainant's equity. *Christie v. Bishop*, 105
2. A bona fide purchaser of property, from a previous grantee to whom it had been conveyed for the purpose of defrauding creditors, is entitled to protection against the claims of the creditors who were intended to be defrauded by the first conveyance. *Frazer v. Western*, 220
3. Rights of purchaser from a defen-

dant in a foreclosure suit, who purchases after decree *pro confesso*. *Bank of Utica v. Finch*, 75

2. *Not affected by admissions of vendor.*  
*See* ADMISSIONS.

### 3. *Purchasers at masters' sales.*

4. The purchaser of mortgaged premises upon a foreclosure and sale thereof, is entitled to the growing crops, or emblements thereon, as against the mortgagor. *Aldrich v. Reynolds*, 613

*See* IDIOTS, &c.

## R

### RECEIVER.

#### 1. *Appointment of same person in different suits.*

1. The 139th rule, relative to the appointment of the same person as receiver in different creditor's suits, only extends to the case of two or more bills filed by different persons against the same judgment debtor; and it does not, in terms, apply to cases where the first suit is against two defendants, one of whom is not a party to the second suit. *Cugger v. Howard*, 368

2. The object of the 139th rule was to save the expense of different receiverships, and to prevent a conflict of claims, between receivers, as to the property assigned to them respectively by the defendants in the different suits. The principle of the rule should therefore be adhered to, even where the same person is made a defendant alone in one suit and is joined with others as defendant in another suit, when the defendants in the respective suits have no conflicting claims; and where the receiver in one suit is willing to act as receiver in the other, and to give such additional security as is required by the court. *ib*

3. In cases coming within the rule, a receiver who has consented to accept the trust in one suit may be compelled to accept and execute the trust in a second suit; provided both suits are commenced before the chancellor, or before the same vice chancellor; so as to give the court jurisdiction over such receiver. And if the receiver refuses to give security in the second suit, he may be removed from his trust

as receiver in the first; and the court may appoint another person as receiver in both suits. *ib*

2. *Effect of appointing a receiver of defendant, pendente lite.*

4. A suit properly commenced in the court of chancery is neither barred nor abated by the appointment of a receiver of one of the defendants *pendente lite*. At most, such an appointment will only render the suit defective; so as to make it irregular for the complainant to proceed until the receiver is brought before the court by a supplemental bill, in the nature of a bill of revivor. *Wilson v. Wilson*, 592

5. Even if such subsequent appointment of a receiver constituted a valid defence, it could not be pleaded as a bar to the suit generally, but should be pleaded in bar of the further continuance of the suit merely; an analogy to the form of pleading in similar cases in suits at law. *ib*

6. Where, by the appointment of a receiver of one of the defendants *pendente lite*, a suit in the court of chancery has become so defective that it is improper for the complainant to proceed until the receiver is brought before the court, the proper course for the other defendant is to apply for an order that the complainant bring the receiver before the court, by a supplemental bill in the nature of a bill of revivor within a time to be fixed, or that the bill be dismissed; and that in the meantime all proceedings be stayed. *ib*

3. *Not discharged by abatement of suit.*

7. The abatement of a suit does not discharge a receiver who has been previously appointed in such suit. *McCosker v. Brady*, 325

#### 4. *Effect of order for appointment*

8. *It seems* the act of April, 1845, in relation to the powers of receivers, and of committees of lunatics and habitual drunkards, does not have the effect to transfer the title of real estate to a receiver, by the mere order of the court, and without an actual conveyance from the party to the suit, in whom such legal title is vested. *Wilson v. Wilson*, 593

5. *Form of order of reference to appoint*

*See* ORDERS.

6. *Assignment to.* See CREDITOR'S BILL, 25 to 27.

7. *His right to examine defendant.*

See CREDITOR'S BILL, 22, 23, 24.

CORPORATION.

TRUSTS, &c.

## REDEMPTION.

See SALES.

## REGISTER IN CHANCERY.

Where the register is appointed guardian ad litem in a partition suit, the trust, upon his resignation of his office of register, devolves upon his successor in office; and notices and other papers in the cause must be served upon the latter. *Wilkes v. Wilkes*, 72

## REHEARING.

A vice chancellor has no power to grant a rehearing, unless it is applied for within six months after the entry of the decree; and before the same has been enrolled. *Boyd v. Vanderkemp*, 273

## RELEASE.

1. It is a general rule that where there is a particular recital in a release, and nothing appears on the face of the instrument to show that any thing beyond the matter of such recital was intended to be discharged, general words of release following such recital will be qualified by it; so as not to discharge other claims which were not in the contemplation of the parties. *Hoes v. Van Hoesen*, 379
2. But the construction of a release must depend upon the language of the instrument itself; and extrinsic evidence cannot be resorted to for the purpose of showing the intention of the party executing such release. *ib*

## REPORT.

*Of commissioners in partition.*

See PARTITION.

*Of master.* See MASTER'S REPORT.

## REVIVOR.

See BILL OF REVIVOR.

## S

## SALES.

1. *When opened, and resale ordered.*

1. It is a rule of the court of chancery that mere inadequacy of price is not sufficient to entitle a party to an order for the resale of lands under a decree, where the purchase has been made by a stranger to the suit, and where the party applying for a resale was in a situation to understand and protect his rights, but has suffered the property to be sacrificed by his own negligence. *Thompson v. Mount*, 607
2. Where the owner of premises covered by a mortgage was a non-resident of the state, and was ignorant of the institution of the suit to foreclose such mortgage until after the sale of the premises under a decree; and the agent to whom he had confided the care of the property, had, by the visitation of God, been so far deprived of his reason as to be incapable of attending to any business, in consequence of which the premises were sold at a price far below their value; *Held*, that it was a proper case for setting aside the sale, and ordering a resale of the premises. *ib*
3. The court of chancery will open a sale of property made under its decree, where the price bid bears no reasonable proportion to the actual value of the property, and where the loss has been occasioned by an accident which no ordinary vigilance and foresight could have guarded against. But the court will not interfere to protect parties against their own negligence, where property has been fairly sold and struck off to a stranger to the suit. *ib*
2. *Redemption of property from sheriffs' sales.*
4. A deputy sheriff, who sells real estate upon an execution, has the right to authorize a deposit of the redemption money with another person, as his agent for that purpose. And a deposit of the money with such agent, within the time allowed by law for redeeming, will be a valid payment to the deputy and will constitute a good redemption.

of the premises from the sale. *Hall v. Fisher*, 53

5. Where the sheriff makes a miscalculation of the interest upon the sum bid by a purchaser, and thereby misleads a party coming to redeem, who in consequence thereof makes a short payment, *it seems* the redemption will, notwithstanding, be held valid and effectual, even at law. *ib*
6. But where the redeeming party makes the calculation for himself, or by an agent employed by him for that purpose, and a mistake occurs, in consequence of which a sum less than the amount due is paid, the redemption will be invalid. *ib*
7. Whether the court out of which the execution issued, could upon an application made previous to the execution of the sheriff's deed, relieve the redeeming party against the consequences of such a mistake? *Quære. ib*
8. Whether a court of equity has power to grant such relief, after the execution of the sheriff's deed to the purchaser? *Quære. ib*
9. No injunction should be granted, in such a case, to restrain a suit at law to compel the redeeming party to account for and pay over to the purchaser the rents and profits of the premises sold, without an allegation in the bill showing that the defence of the complainant at law is imperfect or doubtful. *ib*

#### SECURITY FOR COSTS.

*See* COSTS.

#### SERVICE.

*See* AFFIDAVIT  
PRACTICE

#### SET-OFF.

1. A defendant in a foreclosure suit is not entitled to have set off, against the mortgage debt, an unliquidated claim for damages upon an injunction bond which was given subsequent to the commencement of the suit. *Thompson v. Ellsworth*, 624

#### SHERIFF

1. A deputy sheriff, who sells real estate upon execution, has the right to authorize a deposit of the redemption money with another person as his agent for that purpose. And a deposit of the money with such agent, within the time allowed by law for redeeming, will be a valid payment to the deputy, and will constitute a good redemption of the premises from the sale. *Hall v. Fisher*, 53
2. Where the sheriff makes a miscalculation of interest, upon the sum bid by a purchaser, and thereby misleads a party coming to redeem, who, in consequence thereof, makes a short payment, *it seems* the redemption will, notwithstanding, be held valid and effectual even at law. *ib*

#### SPECIFIC PERFORMANCE.

*See* DECREE.

#### STATUTES.

*See* BANKRUPT, &C.  
COSTS, 15 to 22.  
NON-IMPRISONMENT ACT  
RECEIVER

#### SUPPLEMENTAL BILL.

1. Where the complainant, in a creditor's suit, wishes to contest the validity of a discharge obtained by the defendant, under the bankrupt act, subsequent to the commencement of the suit, his proper course is to file a supplemental bill; stating the commencement of the original suit, the subsequent decree in bankruptcy, the discharge of the bankrupt, and the facts upon which the discharge is claimed to be void and inoperative; and making the assignee in bankruptcy, as well as the bankrupt, a party to such bill. *Penniman v. Norton*, 246
2. Where an original bill has been filed against all the necessary parties, the transfer, by operation of law, of the interest of one or more of the defendants to a third person, who represents the same right and interest—as by a bankrupt assignment pending the litigation—re-

ders it necessary to file a supplemental bill against the grantee or assignee of the original defendant, to bring him before the court as a party. But in such cases the only matter proper to be put in issue upon the supplemental bill—unless some matter of defence has arisen since the joining of the issue in the original cause—is the supplemental matter, which is stated in such new bill, to show the transmission of interest from the original party to the new party who is brought before the court by the supplemental bill. *The American Life Insurance and Trust Co. v. Sackett*, 585

3. The effect of such a bill is to revive the proceedings against the new defendant who has succeeded to the rights of the original party, and to place the proceedings in the same situation as they were in against the former party when the original suit became defective. If the original bill has been fully answered, the new defendant adopts that as his answer to the original bill. If the bill had been taken as confessed, the order pro confesso stands against him, unless he obtains leave of the court to have it opened. And if the proofs in the cause had been closed, they remain closed as against him. *ib*

4. A supplemental bill of this character is a mere continuation of the original suit, against the new defendant who has succeeded to the interest of the former party. And the supplemental suit, together with the original bill and the proceedings under it, constitute but one record. And if the supplemental bill is filed before a decree, the original and supplemental suits are heard together, and but one decree will be made in both. *ib*

See CREDITOR'S BILL, 23.  
RECEIVER.

## SUNDAY.

See EXECUTION.

## SURROGATE.

1. A surrogate has no jurisdiction, to prohibit an executor from contesting

the payment of promissory notes, given by the testator, in an action at law brought thereon; or to restrain him from prosecuting a bill of discovery filed in the court of chancery, for the purpose of ascertaining the consideration of such notes. *In the matter of Parker*, 154

2. Independently of the statute of 1837 a surrogate has power to call in, and revoke, letters of administration which have been irregularly and improperly obtained, upon a false suggestion of a matter of fact and without due notice to the party rightfully entitled to administration. *Proctor v. Wanmaker*, 302

3. A surrogate has the power to open a decree taken by default, and in consequence of a mistake, or an accident. *Pew v. Hastings*, 452

4. Such a power is absolutely essential to the due administration of justice. *ib*

5. Where persons are appointed by the court of chancery, as trustees of a fund which was originally committed to an executor, they cannot be called to account, before the surrogate, in relation to the execution of their trust. *In the matter of Van Wyck*, 565

See ADMINISTRATION, 5.  
EXECUTORS AND ADMINISTRATORS.  
LIMITATION.

## T

## TAXES.

See CORPORATION.

## TENANCY BY THE CURTESY

Where an estate descends to a daughter of the owner, who is a feme covert, and who dies in the lifetime of the mother, to whom dower in the premises is subsequently assigned, the husband of such daughter will not be entitled to an estate by the curtesy in the third of the premises which is thus assigned to the widow of his wife's father for dower; even after the termination of the life estate of such widow



in that third of the premises. *In the matter of Cregier,* 598

See DOWER.

# TRUST, TRUSTEE, AND CESTUI QUE TRUST.

## 1. Nature of the estate.

1. Under the 47th section of the article of the revised statutes relative to uses and trusts, every person who, by virtue of any grant, assignment or devise, is entitled to the actual possession of lands, and the receipt of the rents and profits thereof, has a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest. *La Grange v. L'Amoureux,* 18

2. Where it is apparent from a deed that the property embraced in it was intended to be conveyed to the grantee merely as a trustee for others, and not for his own benefit, he will take no legal title or beneficial interest under such deed. And the persons having the legal estate under such deed are not entitled to a decree directing such grantee to convey the property to them. *ib*

## 2. Validity of trust.

3. The revised statutes have abolished all mere naked trusts of real estate, and only allow trusts to be created for certain specified purposes. *ib*

4. A trust to receive the rents and profits of real estate, and to pay certain annuities to two sons of the testator, for five years, if they should so long live, and to pay the surplus rents and profits to one of them, is a valid trust, under the provisions of the revised statutes, and will continue for five years, notwithstanding the death of one of the annuitants within the five years; or until the trust is terminated by the death of the other annuitant within that period. *McCosker v. Brady,* 329

5. Where A., by a deed executed previous to the revised statutes, conveyed all his real and personal estate to B. in trust that such trustee, or his assigns, or such other person or persons as he should by will appoint for that purpose, should dispose of, lease and manage the trust property, and receive the rents

and income, and after deducting the expenses of the trust, should apply so much of the rents and income to the use and support of the grantor, and of his family, during his life, as the trustee should deem discreet and reasonable, and should invest and accumulate the residue of such rents and income for the benefit of the heirs of A.; and on the further trust, upon the death of A., to account for what should remain of the trust estate, and of the accumulations of the rents and income, to the heirs at law and next of kin of the grantor; *Held*, that under the law as it existed previous to the revised statutes, a person not in debt had the right to give his personal property to a trustee, for the use and benefit of those who should be the next of kin of the donor at the time of his death. And that such trust was valid, not only as to the grantor, but as to all persons claiming under him by title subsequent. *Bryan v. Knickerbacker,* 409

6. *Held also*, that as A. could not have defeated this trust by any act of his own, his creditors, whose debts arose subsequent to the creation of the trust, were not entitled to satisfaction of their debts out of the capital of the estate. *ib*

7. *Held further*, that the trust to receive the rents and income of the trust property, during the life of the grantor, to apply such part thereof to his support as was necessary, and to accumulate the residue for the benefit of his next of kin, at his death, was valid. But that such a trust would not be valid, under the provisions of the revised statutes. *ib*

## 3. Whole estate vested in trustee.

8. Where a valid trust as to real estate is created by will, the whole legal estate is vested in the trustees, so long as any of the valid purposes for which the trust was created continue; so that the *cestui que trust* will take no estate in the lands during the continuance of the trust. *McCosker v. Brady,* 329

9. In all the trusts authorized by the revised statutes, the whole estate both legal and equitable, is vested in the trustee. The *cestui que trust* takes no estate or interest in the land; but may enforce the performance of the trust in equity. *L'Amoureux v. Van Rensselaer,* 34

4. *Power of trustee to charge the estate.*
10. The cestui que trust has no right to charge the trust property, even for necessary repairs thereon, without the assent of the trustee. Nor can the trustee himself do so, except so far as he is authorized by the terms of the trust. *ib*
5. *Interest of cestui que trust in trust property.*
11. *Power of cestui que trust to assign or charge.* A trust to receive the rents and profits of real estate, or the interest or income of the proceeds of such estate, comes within the 63d section of the article of the revised statutes relative to uses and trusts. (1 R. S. 730.) And the cestui que trust cannot assign, dispose of, or in any manner mortgage or pledge his interest in the trust property, or in the future income thereof; nor can he contract any debt which will create a lien upon such future income, so as to authorize a creditor to reach it by any proceeding either at law or equity. *ib*
12. As a feme covert cannot create a debt which will be binding upon her personally, her interest in such future rents and profits cannot be reached until the provisions of the 57th section of the article of the revised statutes relative to uses and trusts. *ib*
13. *When it may be reached by a creditor's bill.* After a creditor of a cestui que trust has exhausted his remedy at law, by execution against the property of his debtor, he may, by a creditor's bill, reach the surplus of such debtor's interest, in the rents and profits or income of property which the cestui que trust cannot alienate and dispose of in anticipation; so as to satisfy the judgment out of that part of the income which is not necessary for the education and support of the cestui que trust, from time to time. *ib*
14. But as a feme covert cannot pledge or create a charge upon her interest in such a trust in anticipation of the income which may thereafter accrue, or become payable to her, and as she cannot contract a personal liability upon which a judgment can be recovered, her interest, even in the surplus income which is not necessary for her support, cannot be reached except for a debt contracted before marriage. *ib*
6. *Effect of discharging one of several trustees.*
15. *It seems* if the court of chancery discharges one of several executors without appointing a new trustee in his place, the remaining executors would not be authorized to execute a power in trust to sell the testator's real estate; so as to give a good title to purchasers. *In the matter of Van Wyck,* 565
7. *Power given to several trustees, by whom to be executed.*
16. By the revised statutes, where a power in trust is vested in several persons, all must unite in its execution. But if, previous to such execution, one or more of such persons dies, the power may be executed by the survivor or survivors. *ib*
17. And where the legal estate is vested in the trustees, with a direction to sell for the benefit of the trust estate, the same result is produced; by the section of the revised statutes which declares that every estate vested in executors or trustees, as such, shall be held by them in joint tenancy. *ib*
18. In the one case, the statute gives the whole power in trust to sell to the survivor, so as to enable him to transfer a good title to the purchaser, by the execution of the power alone. In the other, the whole legal estate is vested in the survivor; and he is thereby enabled to convey the title of the estate to the purchaser upon a sale thereof in the discharge of his trust. *ib*
19. The revised statutes authorize the court of chancery, in the case of a trust relating to real estate, to accept the resignation of a trustee, and to discharge him from the trust, upon his own petition; and they authorize the court to remove him from his trust, for a sufficient cause. And the statute gives the same authority to the court in relation to the acceptance of the resignation of the trustee or a power in trust, and as to his removal from the trusteeship. But the statute does not, in either case, give to the remaining trustees authority to execute the trust alone; as they would have the right to do if the trustee so discharged, or removed, had died, or had never accepted the trust. *ib*
20. And if the person creating the trust has not authorized the trust, or the power in trust, to be executed by a part

of the trustees, the court of chancery must appoint a new trustee in the place of the one who has resigned or been removed, to join with the others in the execution of such trust, or power in trust; in order to give a valid title to a purchaser. *ib*

3. *When trust devolves on court—  
Appointment of receiver.*

21 If one of the three trustees named in a will dies, and the other two refuse to accept the trust, the trust devolves upon the court of chancery, under the provisions of the revised statutes. *McCosker v. Brady*, 329

22. Where a trust has devolved upon the court of chancery, the parties interested in the trust estate may apply to the court to have a receiver appointed to collect and preserve the rents and profits of the property until a new trustee is appointed. *ib*

1. *Resulting trust, how created.*

23 To constitute a resulting trust in real estate, it is necessary that the consideration money, upon the purchase, should have belonged to the cestui que trust, or that it should have been advanced by some other person as a loan to him, or that it should have been advanced as a gift to him or for his benefit. *Getman v. Getman*, 499  
*See DED.*

U

USURY

1. To render a contract usurious, both parties must be cognizant of the facts which constitute the usury. *Aldrich v. Reynolds*, 43

2. If a bona fide holder of a negotiable note which was tainted with usury in the hands of the original payee, receives from the maker a new security for the debt, and gives up the note, without any knowledge of the usury, the security which he takes in lieu of it is not usurious. *ib*

*See JURISDICTION, 11.*

UNITED STATES COURTS.

*See CONSTITUTIONAL LAW.*

V

VENDOR AND PURCHASER.

1. Where A. sold to B. a farm, and agreed to receive, in part payment thereof, a lot owned by B. in Illinois, with the value of which A. was unacquainted; and B. thereupon made false representations as to the character, situation and value of the Illinois lot, to induce A. to take the same in part payment for the farm sold; which A. accordingly did, allowing B. for the Illinois lot a sum greatly beyond its value; *Held*, that A. had an equitable lien upon the farm sold by him, for the amount of the difference in value between the Illinois lot as it really was, and the value as it would have been, had B.'s representations been true; with interest on such difference. *Bradley v. Bosley*, 125

2 If a vendor of land, knowing that the purchaser is unacquainted with its situation or value, makes a false representation as to any matter which, if true, would materially enhance the value of the property, he is, in equity, bound to make his representation good. *ib*

3. The vendor of real estate has an equitable lien upon the estate sold, for the unpaid purchase money, as between him and the vendee, in all cases; unless there is either an express or an implied agreement to waive such lien. *ib*

4. Where, by the fraud of the vendee, a part of the price of the estate sold in fact remains unpaid, although the vendor supposed he had been paid in full at the time, there is no waiver of the equitable lien for the part of the price that actually remained unpaid. *ib*

VICE CHANCELLOR.

To give a vice chancellor concurrent jurisdiction with the chancellor, the cause or matter for which the suit was brought must have arisen within the circuit of such vice chancellor; or the subject matter in controversy must be situated within that circuit at the time of the commencement of the suit; or the defendants or parties proceeded against, or some of them, must be residents of such circuit, at that time. *Brown v. Brown*, 189

*See JURISDICTION OF CHANCERY.*

## W

## WAIVER.

See PARTIES, 12.  
PRACTICE, 10.

## WAY OF NECESSITY.

1. If a man conveys to another a piece of land surrounded by other lands of the grantor, the grantee, and those claiming under him, have a right of way of necessity through such other lands of the grantor; as incident to the grant. And the same principle applies where the piece of land conveyed is surrounded in part by the lands of the grantor, and in part by lands of a third person. *The New-York Life Ins. and Trust Co. v. Milnor*, 353
2. A right of way of necessity, over the lands of the grantor, in favor of the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way; but continues only so long as the necessity exists. *ib*
3. And if the grantee of the dominant tenement, or those claiming the same under him, afterwards, acquires by purchase, or otherwise, a convenient way over his own lands, to the tenement in favor of which the way of necessity previously existed, the way of necessity over the lands of the original grantor of such tenement will cease. *ib*
4. So, if a convenient way to such tenement is subsequently obtained, by the owner thereof, from the opening of a public highway to, or through such tenement. *ib*
5. *Aliter*, where the owner of land has a right of way to the same, over the premises of another, either by prescription or by express grant. *ib*
6. A way of necessity only arises upon the implication of a grant, and cannot be extended beyond what the existing necessity of the case requires. It is only commensurate with the existence of the necessity upon which the implied grant is founded; and when such necessity ceases, the right of way also is terminated. *ib*

## WILL.

1. Where the testator, by his will, disposed of his residuary estate as follows: "I give and bequeath all the rest and residue of my personal estate to all my grandchildren, to be distributed among and paid to them, share and share alike, by my executors in manner and form following: to be vested in good securities bearing interest, and to be paid to them severally as they arrive at the age of twenty-one years in equal shares; estimating the whole amount of such residue of my personal estate at the time of each payment, and thus making an equal distribution of the same among such grandchildren"; and the testator died leaving twenty-three grandchildren, seven of whom were born subsequent to the making of the will; and the testator also left five children, who survived him, and who were living at the time of the filing of the complainants' bill, but none of them had any children born subsequent to the death of the testator; and where at the date of the will, some of the grandchildren were over twenty-one years of age, and others arrived at that age previous to the death of the testator: *Held*, that the proper construction of the residuary clause of the will, was that all the grandchildren of the testator who were in esse at the time of his death, or their legal representatives, and no others, were entitled to share in the residuary estate. *Collin v. Collin*, 630
2. *Held also*, that in order to limit the bequest, in such a case, to those who answered the description of grandchildren of the testator at the time of the making of his will, and to exclude those who answered the description at the time of his death, there must be something in the will itself to show that he meant to confine his bounty to those who were in esse at the date of the will. For, the will being ambulatory until his death, the legal presumption is that he intended to include all who should answer the description at that time. *ib*
3. *Held further*, that as to the shares of the grandchildren who were of age at the time of making the will, and of those who were of age at the death of the testator, he contemplated the distribution thereof immediately upon his death. And the direction in the will that all of the class shall take equal

shares of the residuary estate, necessarily excluded those persons, if any there should be, who were not in esse at the period appointed for the first distribution, viz. the time of the testator's death. And that the testator intended that the shares of those who were not then of age should be accumulated, for their benefit, until the next of them became of age; at which time a new distribution should take place; and so on, until the whole fund was distributed among the grandchildren who were in esse at his death. *ib*

4. The general rule is that, in a will of personal estate, the testator is presumed to speak in reference to the time of his death; and not in reference to any previous or subsequent period. A bequest to the children of A. B., as a class, will include all his children in esse at the death of the testator; including children begotten at that time though born afterwards. *ib*

5. It is also a general rule, that where an estate is to be distributed among a class at the death of the testator, those who are in esse at that time, and no others, are entitled to share in the distribution. But where the distribution is to be made among a class, at the death of a particular person, or upon a contingency which may happen at any time subsequent to the death of the testator, all who answer the description of the class at the time appointed for distribution will be entitled to share in the fund. *ib*

6. Where the language of a will indicates a present bequest of the fund, which is to be distributed at a period subsequent to the death of the testator, those who are in esse at the time of his death will take vested interests in the fund, but subject to open and let in others who may come into being,

so as to answer the description and belong to the class at the time appointed for the distribution. *ib*

7. But where a fund bequeathed to a class is to be divided equally, among the persons composing it, when they arrive at the age of twenty-one or marriage, only those who shall have been born or begotten when the eldest arrives at the age of twenty one, or when the first of the class is married, is entitled to share in the fund. *ib*

See HUSBAND AND WIFE, 4 to 10.

### WITNESS.

1. A defendant who has put in his answer, setting up the defence of usury, cannot be made a competent witness for a co-defendant, to establish the alleged usury, by giving a stipulation abandoning his defence to the suit, and consenting that the bill may be taken as confessed against him, and that the complainant may take a decree against him for the amount he may prove to be due. *Mann v. Cooper*, 185

2. *It seems*, a defendant, after having put in his answer, has no right to abandon his defence for the purpose of rendering himself a competent witness for a co-defendant; without the consent of the complainant, and without obtaining the sanction of the court. *ib*

3. The proper course for the defendant, in such a case, is to apply to the court upon notice to the complainant, for leave to withdraw his answer and be examined as a witness for his co-defendant.

Order to produce See ORDERS, 4



















